No. 119.

Brief of Henry for Appellants.

Filed Mar. 16, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 119.

WILLIAM FAXON, JR., TRUSTEE, ET AL.,
Appellants,

vs.

THE UNITED STATES AND GEORGE W. ATKINSON ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement and Brief for Appellants.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-15-98

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STATEMENT OF THE CASE.

This case was instituted in the Court of Private Land Claims by the filing on the part of William Faxon, Jr., trustee, etc., under the act of March 3, 1891, creating that court, of the petition set out on pages 1 to 7 of the Transcript of Record.

The land claimed by the petitioner is a certain tract commonly known as Tumacacori and Calabasas grant, a private land claim lying and situated in the county of Pima, Territory of Arizona.

The grant is sometimes referred to as the Tumacacori, Calabasas, and Guevavi grant, and the name of Guevavi is frequently spelled Huebabi and also Guebabi (*idem sonens*).

Tumacacori, Calabasas, and Guevavi were each separate and distinct missions originally, and were all founded about the middle of the 18th century by the Order of Jesuits, who continued to administer them until some time after the independence of Mexico, in 1821, and who seemed to have been succeeded in their administration of the same by the Order of Franciscans generally, and in some instances by secular clergymen appointed by the Supreme Church authorities.

Both the missions of Calabasas and that of Guevavi seem for a time at least to have been dependencies on the parent mission of Tumacacori, and all three of these missions, we are told in Bancroft's History of Mexico, had great difficulty in maintaining themselves against the attacks of the savage Apache Indians from the very dates of their foundations. In the month of December, 1806, the missions of Calabasas and Guevavi seemed to have both been abandoned, and the native Indians of Tumacacori petitioned Don Alejo Garcia Conde, political and military Governor, intendente of the Royal Treasury and Judge Privativo of the lands of the Province of Sonora, etc., for a new title to their lands in accordance with the royal instructions, on the 15th day of October, 1754, and of Article 81 of Royal Ordinances and Instructions in relation to the intendentes of the 4th of December, 1786, alleging the loss or destruction of their old title papers, but asserting the ownership of the lands then occupied by them as well as the ownership of the mission of Guevavi.

While this petition of said natives was pending, the governor of said Indians filed an additional petition, which was added to that of said natives and incorporated with their petition as a part thereof, asserting that said natives of the mission of Tumacacori owned other smaller tracts of land

which they had acquired by purchase with the money of the common fund of the mission and natives, and that the lands belonging to said mission of Tumacacori in the direction of Guevavi are bounded by the Rancho of Romero, the monuments of which still exist by the Yerba Buena, at which place also exists a corral in which rodeos were held by our mission, and on the potrero side the measurements reaching to the end of the marsh (cienega).

Under this petition and amended petition the grant was duly executed by said intendente of the community of Indians at Tumacacori, situated in the district of Pimerea Alta, in the jurisdiction of the military post of Tubac, for all of the lands set forth in said original petition, as well as for all the lands set forth in amended petition, according to the survey of said lands which was made by reason of said petitions, and also according to the boundaries of said lands as set forth and described in the testimony of the occupants and owners of adjacent grants, who appeared as witnesses and testified prior to said survey as to the correct location of three of the monuments of said grant.

The title papers recited that the lands are all located in one body, and nine points are particularly described as sites or places for monuments in such title papers.

These points are all specifically described and fixed by well-known and unmistakable natural landmarks.

The mission of Tumacacori was entitled to 4 sitios of land as a fundo legal or farm and to 2 sitios as an estancia or ranch for stock-raising purposes. The mission of Calabasas was entitled to a similar amount of land, and likewise the mission of Guevavi.

The combined quantity of land to which these three missions were entitled was 18 sitios, or a total of a little more than 78,000 acres, and the community of Indians and the mission of Tumacacori were granted all of the lands of their own mission and of the missions of Calabasas and

Guevavi, as well as certain additional lands which they claim to have purchased and to own.

This grant as surveyed contains a little less than 17 sitios, or a total of 73,246.7 acres, as claimed by us.

The intendente who made this grant was instructed by Article 2 of said law of October 15, 1754, *to maintain the Indians in their possessions and to give them more land, as the exigencies of the population require, and said officer was instructed to act with verbal and not judicial process in questions of lands held by Indians, and particularly where their farms, farming, and stock-raising are in question. No limitation is placed upon the power of the officer as to the quantity of the land which he may grant to the Indians, but he is required to use his discretion and grant them as much land for farming and stock-raising as they may require, and is further instructed to act leniently with them.*

On February 10, 1842, an order and command was issued by Santa Anna, as President or Dictator of Mexico, requiring the sale of "temporalities" throughout the Republic.

On April 19, 1844, the Treasurer General of the Department of Sonora, in compliance with this command of Santa Anna, and in accordance with Article 73 of the law of April 17, 1837, duly made, executed, and delivered a titulo or patent for all the lands described and included in said grant of 1807 to Francisco Alejandro Aguilar for the sum of five hundred dollars, said Aguilar having been the highest and best bidder at the public auction sale of said lands, which had been completed in accordance with law by said Treasurer General, at the town of Guaymas, in the Department of Sonora, on the 18th day of April, 1844, and said Aguilar having paid the amount of his bid, said sum of five hundred dollars, and the other necessary fees into the Departmental Treasury.

The money for this purchase by said Aguilar was all furnished by his brother-in-law, Manuel Maria Gandara, and said Aguilar took the title as trustee for said Gandara. This fact is admitted by the Government.

In the year 1848 the grant was resurveyed by Mexican officials, and in the year 1851 said Manuel Maria Gandara took possession of the lands and placed from 30 to 50 settlers upon the same, as well as about 6,000 head of sheep and a limited number of cattle and horses. These settlers cultivated the lands and engaged in the manufacture of serapes out of the wool from said sheep, all under the direction and control of and at the expense of said Gandara.

In the early part of the year 1852 said Gandara was occupying the best grazing and farming lands in each and every part of this grant and had extensive and substantial houses upon the same at Calabasas, which had cost several thousands of dollars, as well as having good and substantial corrals and other improvements on different parts of the grant.

Said Gandara was thus maintaining possession and had as many as fifty people in his employ who were herding said sheep and cultivating said lands at the time the American boundary surveyors and the Southern Pacific railroad surveyors reached that section of the country, about the month of April, 1854.

This possession was continued by Gandara until late in the year 1856, by which time all of his employés had either been killed or driven off the ranch by the Apache Indians, owing to the withdrawal of Mexican troops from the adjoining post of Tubac.

Gandara again resumed possession of the grant in the year 1861, and one of his sons was killed upon the land by the Apache Indians in the year 1862. Gandara filed a petition for the confirmation of his title with the surveyor general of Arizona on June 9, 1864, and at that time he filed with said surveyor general the original titulo or patent of 1807, and the original titulo or patent of 1844, which are now on file with the clerk of this court as evidence of his title.

Said Francisco Alejandro Aguilar conveyed these lands to said Manuel Maria Gandara on March 31, 1856, and he

again conveyed them by a more formal deed of conveyance to said Gandara on March 2, 1869. This latter conveyance recites the fact that no consideration passed between them for the land at that time, and the value of the land is recited in that instance as being the sum of $499.

Said Gandara deeded said lands to an American citizen, C. P. Sykes, July 24, 1877, for the sum of twelve thousand dollars. Said Sykes immediately took possession of the land, and in 1879 he filed a new petition for the confirmation of the grant with the surveyor general of Arizona; and after said surveyor general had caused an examination of the archives of Mexico to be made by a special agent named R. C. Hopkins, and had caused a survey of these lands to be made in accordance with the calls of the title paper of 1807, by a United States deputy surveyor named Harris, said surveyor general of Arizona made a report to the Commissioner of the General Land Office declaring that this grant is undoubtedly genuine and recommending its confirmation to the full extent of the boundaries as called for in said titulo of 1807.

Said Gandara died in the year 1879, and said Aguilar died in the year 1886.

Said Sykes sold and deeded an undivided $\frac{3}{16}$ interest in said lands to John Currey on the 26th day of November, 1878, for the sum of $9,000.

Said Sykes and Currey deeded said lands to the Calabasas Land and Mining Co., a corporation, on December 18, 1879.

Said Calabasas Land and Mining Co. deeded said lands to the Santa Rita Land and Mining Co. of Colorado, a corporation, on September 21, 1881.

Said Santa Rita Land and Mining Co. mortgaged said lands to Solomon S. Sleeper and Edward H. Mason, both of Boston, Mass., as trustees, on March 1, 1886, for the sum of $250,000.

Said Sleeper and Mason, as such trustees, sold said lands

to satisfy said mortgage on the 11th day of February, 1890, to George B. Wilbur ,William E. Putnam, Pliny Nicholson, and William A. Pierce, all of the State of Massachusetts, for the sum of $65,000, as a purchasing committee for the holders of the bonds which were secured by said mortgage.

Said Wilbur, Nicholson, Putnam, and Pierce, as such committee, conveyed said lands on May 9, 1892, to William Faxon, Jr., of Boston, Massachusetts, as trustee, to hold the same for parties owning $237,000 of said bonds, the other $13,000 of bonds having been satisfied and paid.

About one hundred persons are named as codefendants with the United States in our petition.

They are all parties who squatted upon these lands and took forcible possession of the same after the lands were withdrawn from entry by the Government and since the year 1880, although said Sykes took immediate possession in said year 1877, and although he and his successors in interest have maintained continual and uninterrupted possession ever since, and have continually been assessed for and paid the taxes upon the whole thereof.

One of said defendants, who name appears as "John Doe," is Henry O. Flipper, a Special Agent of the Department of Justice, who admitted that he still claims 160 acres of the best part of said lands while testifying as the sole and only witness produced by the Government to dispute the location of the boundaries of this grant as established by appellant. The other squatter defendants were represented upon the trial of the case by an intelligent and experienced attorney (William H. Barnes), but not a single one of them testified in the case or in any way undertook to dispute the location of the boundaries of the grant as claimed by us.

Three claimants filed petitions alleging ownership of this grant; but one of them, George Hill Howard, simply claims to own an interest in the same under this appellant by virtue of a certain contract alleged to have been made by said Gandara to one Claude Jones, purporting to convey a

limited part of this grant for services to be performed by him in aiding to secure its confirmation as an attorney.

The third petition is filed by certain claimants who declare themselves to be the heirs of said Francisco Alejandro Aguilar, and who conveyed a certain interest in any land or property they might own in Arizona to one Santiago Ainsa upon condition that he secure confirmation to the title of the same. Said Ainsa contends, on behalf of these claimants and himself, that the deeds of 1856 and 1869 from said Aguilar to said Gandara only conveyed a life estate in said lands because the word "heirs" is not specifically used in the granting clause in either of said instruments.

The possession of these lands by said Gandara for at least two years prior to the Gadsden Treaty was established by fifteen witnesses on the part of this appellant, and was not disputed by the Government.

It was also shown that on March 31, 1856, before the judge of the second instance of the district, said Francisco A. Aguilar made a conveyance of said land to said Manuel Maria Gandara, at the city of Guaymas, in said State of Sonora, and said Gandara then and there exhibited said original titulos of 1807 and 1844; that José Aguilar, the brother of said Francisco A. Aguilar, was at that time the Governor of the Department of Sonora, and that said Gandara headed a revolution against José Aguilar in the following month of April, 1856, and that said Gandara was compelled to flee from that part of the country in June or July, 1856, and that one Pesquira captured said city of Guaymas not later than September, 1856, after a determined battle with the forces of said Gandara, and took possession of the government of said Department by force of arms, and continued to act in said capacity of Governor for some considerable time thereafter.

It was also shown that said Pesquira confiscated all the personal property of Gandara which he could find in said Department of Sonora, and likewise took possession of all

the real property of said Gandara, and attempted to confiscate that also.

It was further shown that early in the month of February, 1857, said Pesquira appointed an examiner to take possession of the Treasury office of said Department of Sonora, and that said examiner, one Torebiro Gutierrez, removed from the archives of said Treasury Department four expedientes of land grants, and that among them were the expedientes of the Tumacacori and Calabasas land grant which was owned by said Gandara.

The original documents appointing said Gutierrez as examiner and the receipt given for said expedientes were introduced in evidence and submitted to the examination of said Court of Private Land Claims, and certified photographic copies of the same were filed with said court. Said original papers were produced by B. Rochin, the official Keeper of the Archives of the present State of Sonora, and he testified that they are a part of the archives which are in his possession, and that they were a part of said archives at the time he took possession of the same, as the official custodian thereof, in the year 1887, and that he found them in a box in said office, among a mass of other documents relating to land titles. He also testified that the handwriting on said papers was the same as that of many documents relating to land titles which are in said archives and which bear date about the time of said papers, and that said handwriting was that of one of the clerks of said Treasury Department at said period.

Said papers were also identified, and their genuineness and authenticity sworn to by one Eufemio Tapia, who was the acting Treasurer of said Department at the date of the execution of said papers and who signed one of the same as such officer. Said Tapia testified that said papers were seen by him at the time they were executed, and that they were executed upon the days they bear date, and he further testified that he at that time had in his hands the original

expedientes of Tumacacori and Calabasas land grant claim and delivered the same to said Gutierrez.

It was also shown that the book of Cargo y Data for said year 1844 is missing from the archives of said Treasury Department, and that the contents of said archives were in almost hopeless confusion as late as the year 1887, when said B. Rochin took possession of the same as the official keeper thereof, and that an attempt was then made by him to straighten out the records and make an exact and detailed statement of the contents thereof, and that said statement was published by him in the year 1889. Said statement is in evidence in this case.

It was also shown that frequent revolutions occurred in said State of Sonora and said Department of Sonora from the year 1835 until after the year 1865, and that it was a common thing for the successful revolutionists to destroy the papers and records contained in the archives of the Treasury Department.

It was also shown that the archives at Hermosillo now contain but two books of Toma de Razon; that the first one is a very small book, without a cover, containing only a few entries or notes of sales of land, covering part of the year 1824 and part of the year 1825; that the other book of Toma de Razon consists of but 82 leaves stitched together, with a parchment cover, and containing the entries or notes of sales of land beginning in the year 1831, the date at which the Commissary General for the State of Sonora was first authorized by law, and ending in the year 1849. This book of Toma de Razon is not numbered. It contains no grants of land for the years 1840, 1842, 1844. The archives of said State of Sonora contain expedientes of grants of land made in each of said years, and especially in the year 1844, as shown by such statement or record of the expedientes contained in the archives, which was prepared by said B. Rochin; and said statement also shows that there are 742 expedientes in said archives which are complete in

every respect, and which contain endorsed upon them the statement that the money was properly paid into the Treasury for the land described in said expedientes, and that a titulo for the same was issued. But said two books of Toma de Razon contain a list of only 365 titulos. Many inaccuracies also occur in said books of Toma de Razon, and quite a number of entries therein bear date as of an earlier period than the entries immediately preceding them.

The original titulos of 1807 and 1844 were admitted in evidence without objection after full proof of their genuineness.

No evidence was offered on the part of the Government attacking the authenticity and genuineness of any of the papers offered in evidence by the petitioner.

The boundaries of said grant were established by overwhelming evidence, in accordance with the call of said titulo of 1807 and the testimony of witnesses attached thereto, and no serious effort was made on the part of the Government to defeat the establishment of said boundaries as therein set forth, except as to the east center monument of the Calabasas grant, and it was conceded by the evidence on the part of the Government that by striking out the words "Cerro San Cayetano" from one part of the description of said east center monument as surplusage and error, said Calabasas grant can easily be located according to the calls of said expediente of 1807.

The testimony of witnesses attached to said expediente of 1807 demonstrates beyond all question that said words "Cerro San Cayetano," or, rather, the words "San Cayetano," were inserted in said description by mistake.

It is conceded upon the part of the Government that Ignacio Lopez, who executed the titulo or patent of 1844 which was delivered to said Aguilar as grantee, is the national officer who possessed the proper political power at said time to execute said titulo or patent; but a bare majority of three members of the Court of Private Land Claims

rejected this grant upon the sole ground that said granting officer did not cause the auction sale of said lands to be made in the proper manner. Said Treasurer General made the sale himself and said Court held that the power to make sales of land was vested only in two Boards of Sale, one of which was created under the regulations of July 20, 1831, and the other under the law of April 17, 1837.

In the titulo of 1844 the granting officer expressly recites the fact that he made the sale alone by virtue of Article 73 of said law of April 17, 1837, because the land did not exceed in value the sum of five hundred dollars.

This appellant duly appealed to this Court from the decree of said Court of Private Land Claims rejecting this grant.

ARGUMENT.

There are just three principal questions involved in this case, to wit:

1. Did the officer who made the grant transcend his powers in making it?

2. Was the grant located and duly recorded in the archives of Mexico prior to the Gadsden treaty?

3. Can the grant be located upon the earth's surface from the calls of the title papers, or by the testimony of witnesses, as a well-known place, or is it void for uncertainty?

A bare majority of three members of the Court of Private Land Claims rejected this grant "for want of power on the part of the officer attempting to make it." The fourth member of that court, Justice Fuller, dissented from this opinion, and the fifth member of said court took no part in either the hearing or the determination of the case. One of the three members of that court, Justice Murray, who concurred in rejecting the grant upon the first ground, wrote an opinion rejecting it upon the additional ground that it was not duly recorded in the archives of Mexico, for the reason only that no record of the same appears in any book of "Toma de Razon;" and the fourth member of said court, Justice Fuller, concurred in rejecting the grant upon this latter ground while dissenting upon the first ground. It is proper to add that a majority of said court had previously decided the other way, upon this second ground of rejection, in the case of The U. S. *vs.* Earl B. Coe, which is now on appeal to the October term, 1896, of this court as case No. 45.

The writer has been fortunate enough to be presented with a copy of the brief on the part of the United States in

this case, and in consequence of that fact this argument will be in part a reply to the position assumed by the Government upon the questions involved. Two-thirds of the brief on the part of the Government is devoted to an attempt to demonstrate as a fact that this grant is void for uncertainty, and cannot be located upon the earth's surface from the calls of the title papers. Only eight pages out of the seventy-nine contained in that brief are addressed to the question of the power of the granting officer to make this grant, and that is the very last question discussed in said brief.

This method of presenting the case on the part of the attorneys for the Government may properly be characterized as significant and peculiar, to say the least, and it will hardly be contended with any force that it indicates very much faith on their part in the correctness of the position assumed by the Court of Private Land Claims upon the only question seriously considered by it. At least the writer must hesitate to accept any other view of their brief, as to do so would be equivalent to acknowledging that their brief is a severe reflection upon the value of the necessarily long argument presented by him on this question.

I must confess that the conclusion at which a person will arrive who undertakes to investigate the validity of the title of one of these Mexican land grants will depend largely upon the frame of mind in which he approaches the subject. Without knowing the history of Mexico, and especially that of the State of Sonora, and without being familiar with the condition of the public archives in that State, if a lawyer attempts to pass upon the validity of one of those titles by applying the strict principles of the common law only, and upon the theory that he is examining an abstract of title for the purpose of giving his opinion as to the advisability of making a substantial loan to be secured by a mortgage upon the land, for a banking corporation which makes it a rule never to accept the faintest semblance of a moral risk, it is true that quite a number of the grants in Arizona would

fail to stand the test; but if these titles are to be examined from the standpoint of a great nation that has plighted its honor and its faith to maintain inviolate the rights of private property, and to recognize all grants which would be recognized as good and valid by the Government which ceded the territory within which they lie, it must follow as night follows day that practically all of the grants in Arizona which have come before the Court of Private Land Claims must be sustained as valid.

It is now forty-four years since the Government of the United States acquired by purchase the land within the Territory of Arizona. Until March 3, 1891, Congress reserved to itself the right to determine the validity of the titles to Mexican private land claims within that Territory. Within a few years after the Gadsden purchase Congress itself confirmed quite a number of land claims lying within the present boundaries of New Mexico and Colorado, and in so doing it made serious blunders, and confirmed one grant for 1,714,764 acres and another for 1,000,000. Congress has shamefully denied justice to every honest grant claimant within the region of the Gadsden purchase for nearly a quarter of a century. (See Public Domain, p. 1117.) The plighted faith and honor of the Government had been dragged in the dust by the inaction of its political representatives, and the boasted guarantees of our glorious Constitution have been of no avail in protecting and guaranteeing a grantee of the Mexican government in either his alleged principality or his actual mess of pottage. In a letter to the Mexican Minister of Foreign Relations our Secretary of State said:

"It is our glory that no power exists in this country which can deprive one individual of his property without his consent and transfer it to another. If grants of land in Texas under the Mexican government possesses valid titles they can maintain their claims before our courts of justice."

Again, said our Secretary of State:

"The property of foreigners, under our Constitution and laws, will be equally secure without any treaty stipulations."

Again, he says:

"And here it may be worthy of observation, that if no stipulations whatever were contained in the treaty to guarantee to the Mexican inhabitants and all others protection in the free enjoyment of their liberty, property, and the religion which they profess, these would be amply guaranteed by the Constitution and laws of the United States. These invaluable blessings under our form of government do not result from treaty stipulations, but from the very nature and character of our institutions."

As was said by this court in De Lasses *vs.* U. S., 9 Peters, 133:

"Independent of treaty stipulations, this right (the perfect inviolability and security of property) would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; to transfer lands which had been severed from the royal domain. The people change their sovereign. Their right to property remains unaffected by this change. The inquiry, then, is whether this concession was regularly made by the proper authorities," etc.

In view of these statements it would have been better for its citizens if Mexico had not stipulated in the treaty for the protection of their property in the ceded territory. These extracts from the letter of our Secretary of State read like mere Fourth-of-July orations when taken in connection with the facts in relation to the grant which is now here before this court.

POSSESSION ONE OF THE HIGHEST EVIDENCES OF TITLE KNOWN TO THE COMMON LAW, AS WELL AS TO THE CIVIL LAW.

It is overwhelmingly established by the evidence in this case—and the fact was not disputed by the Government upon the trial of the case—that Manuel Maria Gandara was the original equitable owner of this grant at the time it was made in 1844 to Francisco Alejandro Aguilar, in the year 1844, the latter having taken the legal title as trustee for said Gandara, and that said Gandara took possession of this grant not later than the early part of the year 1852, and maintained said possession without interruption until at least as late as the end of the year 1856, and that said Gandara resumed possession again as early as the year 1861, and continued to maintain said possession through himself and his successors in interest, including this petitioner, until the present time; that one of the sons of said Gandara was killed upon said land while maintaining such possession, in the year 1862; that in said year 1852 said Gandara placed as many as from 30 to 50 families upon said land, together with from 5,000 to 6,000 head of sheep and other stock, and had said families cultivating the agricultural lands upon all parts of the grant and manufacturing blankets from the wool of said sheep. The testimony further shows that said Gandara, in said year 1852, placed extensive and costly improvements, in the shape of houses, fences, corrals, etc., costing thousands of dollars, upon said lands. It further shows that many of these settlers were killed by the Indians prior to the time the American troops took possession of Arizona, in 1855, as well as afterwards, and many of his sheep and other stock were frequently killed or driven off by said Indians.

These facts were established by as many as 15 witnesses, including natives of the mission of San Xavier, the

nearest mission to this grant, which is still existing in Arizona, and natives of the town of Santa Cruz, which was then the nearest town to this grant within the present limits of Mexico, and by ex-soldiers of the Mexican army who were located in that vicinity at the time, and by American citizens who came into that region of country in the early part of the year 1854 upon the Southern Pacific Railroad survey and upon the International Boundary survey.

See Record, pp. 54 to 96.

Ex's E to O, pp. 284–308; 180–'1, 185.

Peter R. Brady, an American citizen, who first went to Arizona in April, 1854, upon the survey of the Southern Pacific railroad, testified that he stopped at Calabasas upon his arrival and found settlers there and at Tumacacori who were holding possession of the land for said Gandara; that they were cultivating the lands and manufacturing serapes and had a large band of sheep and other stock; that they had very extensive adobe houses, built in the old Mexican style, with a large portal and entry in them and a courtyard inside; that the Apache Indians attacked the ranch while he was there and were driven off by Mexican troops who came from Tucson, which is about 60 miles away.

Mr. Brady stated that the Mexican troops never left Tucson until Christmas eve, 1854, when they pulled down the Mexican colors on the plaza and marched out. He said:

"There was only the one settlement at Calabasas, under Hulseman, and the three Germans I spoke of at Tumacacori, outside of the walled garrison at Tucson, at that time; no other Europeans or Mexicans in the whole Territory. This was due to Apache raids, I suppose. We passed through a great many abandoned ranches on the San Pedro and Babacomori. There was nothing but desolation and ruin. It was dangerous to go outside of the limits of the town of Tucson, almost. The Apaches killed people within a mile of town here years afterward. Property or life was not safe anywhere outside of the walled garrison of Tucson." (See Record, pp. 58, 59, 60, 74, 75, 76.)

We produced as witnesses or accounted for the absence of every person who ought to have had a personal knowledge in regard to these facts. I particularly invite the attention of the court to the testimony of the witness Theodora de Troil, at pages 54, 55, and 56, and at pages 95 and 96 of the Record. She is a native of the neighboring mission of San Xavier, 54 years of age, and is a sister of the wife of said Hulseman, who was the superintendent of this Calabasas grant for said Gandara from 1852 to 1856. I also invite the attention of the court to the testimony of Jesus Maria Elias, at pages 61 to 71 of the Record. This witness was born at Tubac, a place adjoining this grant on its northern boundary, in the year 1828, and his father and mother were married at Tumacacori, in the church which was taken as the center of this grant, and his elder sister was born at Calabasas, upon this grant. He lived at Calabasas for two or three years, and at the age of 7, in the year 1835, was taken to Tucson to reside. He passed the grant prior to the year 1844 in going over the trail to said town of Santa Cruz and found it abandoned. He again passed the grant in 1852 and found it settled by and in the possession of said Hulseman and about 30 or 40 Mexican families, who were all working for said Gandara.

This witness, Jesus Maria Elias, identified all the places the natural landmarks called for in the title papers of the grant. All of his statements in regard to both the possession and the landmarks and places were corroborated by other witnesses.

The Government did not dispute the correctness of the testimony of this witness as to a single point, and it made no attempt to impeach the credibility of any one of our witnesses in any respect.

The earliest date at which we were able to furnish positive and affirmative proof of possession is the year 1851 or early in the year 1852, but the evidences of possession existing in the early part of the year 1852 in the shape of improve-

ments upon the grant demonstrate that possession was actually taken as early as 1850, perhaps, and not later than the middle of the year 1851.

It must be remembered that this grant is located upon what was at that time the frontier of the State of Sonora. It was made in 1844, and hostilities between Mexico and this country commenced in the year 1845 and lasted until late in the year 1848. This fact alone would account for Gandara not having taken possession of the land until as late as the year 1849, even if he had not been actively engaged as a leader in politics in Sonora during that stormy period of its history. The danger from American troops, added to the danger from Apache Indians, was sufficient to deter almost any man from risking a large investment in live stock and improvements in that exposed place.

Jesus Maria Elias testified at page 63 of Record that in the year 1848 he met three surveyors at the mission of San Xavier, who had just completed the survey of the Calabasas and Tumacacori grant for the government of Sonora. This would indicate that Gandara instituted steps to take possession of the grant immediately upon the close of our war with Mexico, and a short time thereafter we find him in possession and the land is stocked with sheep and has many valuable improvements upon it.

EFFORTS OF GANDARA TO ESTABLISH TITLE.

A law was enacted by Congress in 1863 providing for the appointment of a surveyor general in Arizona and giving him jurisdiction to examine and report upon the titles to Mexican land grants located within that Territory.

In June, 1864, said Gandara promptly availed himself of this apparent opportunity for establishing and quieting his title as against the United States. He filed his original title papers with said surveyor general and pressed for an examination into their authenticity and validity at a time when

there were numerous living witnesses to affirm or controvert the truth of the facts recited in his title papers. The question of the due record of the grant could then have been easily settled by living witnesses, and the question of the *bona fides* of his occupation and possession prior to the treaty could have been determined by the testimony of the very men whom he employed to settle upon and cultivate said land for him. (Record, p. 285.)

Gandara was unfamiliar with the laws of this country, as is evidenced by the character of the deed from Aguilar to him which is dated March, 1856, and likewise by that which is dated March 2, 1869. This latter deed was evidently suggested by some American lawyer, upon the theory that the deed of 1856 did not sufficiently comply with the laws of Arizona to effect a conveyance of the fee. Even this latter deed was not sufficiently explicit and formal to prevent certain heirs of Aguilar from claiming that it does not convey the fee to said lands, and this accounts for the fact that other petitioners are claiming to own this grant.

Having evidently despaired of ever securing a settlement of his title, said Gandara sold and conveyed said grant to an American citizen, C. P. Sykes, in the year 1877, for the consideration of $12,000. Sykes took immediate possession, and in the year 1879 he filed a new petition with said surveyor general for the confirmation of this grant. The surveyor general thereupon caused the record of said grant to be investigated in the archives of Mexico by R. C. Hopkins, a special agent of the Department of the Interior, and upon the report of said Hopkins and other testimony said surveyor general duly reported to the Commissioner of the Land Office that this grant is undoubtedly genuine and ought to be confirmed to its boundaries, as set forth in the expediente and in the titulo of 1807, which is now on file with the clerk of this court. Said surveyor general also caused a survey to be made of said grant under his own direction and control by one Harris, a deputy United States surveyor, then

in the employment of the Government, and the map made by said Harris shows that he adopted the same natural landmarks as the boundaries of said grant, which are set forth in the map filed by the petitioner in this case (p. 180).

SEIZURE OF THE BEST LANDS BY SQUATTERS.

The lands comprised within this grant were withdrawn from entry as early as the year 1870, and up to that time no one but Gandara and his employés had dared attempt to hold possession of the lands against the raids of the Apache Indians. In fact it was not until after the Southern Pacific railroad had been completed in the year 1882 that any squatter cared to occupy these lands, the possession of which had been maintained by Gandara and his grantees against the savage Apaches for more than thirty years, but as soon as life and property were perfectly safe in that section of the country squatters rushed upon the land and forcibly seized all the best lands. (Record, pp. 176–177, 100.)

The squatters were represented by especial counsel in this case. (Record, pp. 12, 23.)

Henry O. Flipper, now a special agent of the Department of Justice, and the only witness on the part of the Government who has attempted to defeat the location of the boundaries of this grant as claimed by us, enjoys the distinction of being one of those violaters of natural justice and of common respect for the rights of others; he still claimed squatter rights upon this grant at the date upon which he testified in this case. (See Record, p. 205.)

The courts of justice in Arizona have held that they had no jurisdiction to entertain even an ejectment suit where the title to a Mexican land grant in anywise came in question. Force of arms had enabled the owners of this grant to maintain their possession against the ferocious Apaches, but even this argument failed them as against the civilized invaders who followed in the wake of the United States sol-

diers and the railroad, and who are now here as codefendants with the United States Government, asserting that they have equitable rights which are higher than ours in the property they took from us by force while we were in the open and notorious, if not peaceable, possession of the same.

The testimony shows that these squatters have constantly cut and destroyed our fences, besides occupying our best lands, and that they have been and are still denuding the grant of its timber; and the testimony further shows that the courts of Arizona repudiate the possession of any power on their part to grant us any relief.

These courts of Arizona have not refused to entertain tax suits, however, and the only privilege accorded a grant-owner in that Territory has been the doubtful one of being allowed to pay and required to pay exorbitant taxes upon the entire grant for the support of a government to enforce laws for the protection of all property except that upon which said tax is paid.

This is the story in brief of the manner in which this great nation has thus far executed its contract with Mexico to preserve inviolate the rights of private property within the Territory of Arizona.

POWER OF THIS COURT IN DETERMINING VALIDITY OF TITLES.

In 1891 Congress shifted the burden of responsibility from the political arm of the Government to the judiciary by the passage of the act creating the Court of Private Land Claims. It is now urged by the attorneys for the Government that Congress intended to do a still greater injustice to the grant-owners and to practically confiscate many of the grants by confining the power of the courts in determining the validity of these titles within very strict and narrow lines. I am loath to concede this construction of the act of Congress. While that body might be guilty of gross injustice by reason of inaction on the part of a majority of its members, I can-

not believe that a majority of those members would by any affirmative action intentionally deprive a single grant-owner of any of the rights he would have enjoyed had his property remained within the jurisdiction of Mexico.

The contention that Congress intended by said act to deprive this court of the right to apply the well-known principles of equity in determining the validity of these titles to land grants is based upon a very narrow and illiberal construction of that act, it seems to me, and is not in harmony with the established rules of construction for such laws.

This contention is based upon the language used in sections 7 and 13 of said act. Section 7 provides—

"That all proceedings subsequent to the filing of said petition shall be conducted, as near as may be, according to the practice of the courts of equity of the United States," etc.

The words "all proceedings subsequent to the filing of said petition" must certainly include the taking of the testimony, and likewise the rules of evidence which shall be applied in rejecting or admitting evidence.

The same section proceeds to provide—

"That the court shall have full power and authority by a final decree to settle and determine the question of the validity of the title and the boundaries according to the law of nations and stipulations of the treaties concluded between the United States and the Republic of Mexico, at the city of Guadalupe Hidalgo, on the 2d day of February, A. D. 1848, or the treaty concluded between the same powers, at the city of Mexico, on the 30th day of December, A. D. 1853, and the laws and ordinances of the government from which it is alleged to have been derived," etc.

It is further urged on the part of the Government that because this enumeration of the laws by which the court shall be controlled in determining the validity of the title

and the boundaries of the grant omits to use the words "principles of equity," "usages," and "customs," the effect of the act is to deprive the court of the power to apply the principles of equity upon the determining of the validity of a title to a grant or the location of its boundaries, and is likewise to deprive the court of the right to take into consideration the usages and customs of the government which made the grant in determining its validity or its boundaries.

It is a well settled rule of construction that treaties are to be liberally construed in their application to private rights of property, and it must be equally clear that in order to give full effect to this rule all acts or laws intended to provide the means for fulfilling the obligations of such a treaty ought to receive the same liberal construction. In the case of *Phelps vs. The City of Panama*, 1 Washington Ty., 533, decided in 1877, the court said:

"The term 'laws' includes not only written expressions of the governing will, but also all other rules of authority and conduct in which the supreme government exhibits, and according to which it exerts, its governmental force."

This definition would certainly include "the principles of equity," as well as "usages" and "customs."

But we are not left in doubt as to the meaning which ought to be given to the word "laws" in this act, for in the case of the *United States vs. Arredondo*, 6 Peters, 714, this court said:

"The principle that the acts of a king are in subordination to the laws of the country applies only where there is any law of higher obligation than his will. The rule contended for may prevail in a British, certainly not in a Spanish, province. There is another source of law in all governments, *usage* and *custom*, which is always presumed to have been adopted with the consent of those who may be affected by it. In England, and in the States of this Union which have no written constitution, it is the *supreme* law; always deemed to have had its origin in an act of a State

legislature of competent power to make it valid and binding or an act of Parliament, which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all (2 Inst., 58; Willes, 116). So it is considered in the States and by this court (3 Dall., 400; 2 Pet., 656–'7). A general *custom* is a general *law*, and forms the law of a contract on the subject-matter; though at variance with its terms, it enters into and controls its stipulations as an act of Parliament or State legislature.

"The *courts* not only *may*, but *are* BOUND to, notice and respect *general customs and usage* as the *law* of the land *equally* with the *written law*, and when clearly proved they will *control* the general law. This necessarily follows from its presumed origin—an act of Parliament or a legislative act. Such would be our duty under the second section of the act of 1824, though its *usages* and *customs* were *not* expressly named as a part of the laws or ordinances of Spain. The first section of that act, giving the right to claimants of land under titles derived from Spain to institute this proceeding for the purpose of ascertaining their validity, and jurisdiction to the court to hear and determine all claims to land which were protected and secured by the treaty, and which might have been perfected into a legal title under and in conformity to the law, usages, and customs of Spain, makes a claim founded on them one of the cases expressly provided for. We cannot impute to Congress the intention only, not to *authorize* this court, but to *require* it, to take jurisdiction of such a case, and to hear and determine such a claim, according to the principles of justice, by such a *solemn mockery* of it *as would be evinced by excluding from our consideration* USAGES *and* CUSTOMS, which are the *law* of EVERY *government*, for no other reason than that in referring to the *laws* and *ordinances* in the second section Congress had not enumerated all the *kinds* of *laws* and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain; we might as well exclude a royal order because it was not a law. We should act on the same principle if the words of the second section were less explicit, and according to the rule established in *Henderson vs. Poindexter*, 12 Wheat., 530, 540."

The question under the act creating the Court of Private Land Claims is, Was the grant "lawfully and regularly derived"? and the very question decided in the Delassus case just cited was that the real question there at issue under the Louisiana treaty is "whether this concession was REGULARLY made by the proper authorities."

A grant "*made by the proper authorities*" is a grant "*lawfully*" made, and hence the court has the same identical question to decide under this act creating the Court of Private Land Claims as it had under the Louisiana treaty, to wit, Was the grant "*regularly made by the proper authority*"? and it has no other question to decide whatsoever; and in deciding this question it is "*bound* to notice and respect general customs and usages as the law of the land equally with the written law;" and how is it possible to pass on the validity of incomplete or imperfect grants except by applying the well-known principles of equity which Mexico herself would apply in a similar case?

Can a case be conceived in which the decision would more pointedly decide the exact question involved in this contention on the part of the Government than the one just cited?

But it is further contended that under subdivision 1 of section 13 of said act creating the Court of Private Land Claims the power which this court exercised in applying the principles of equity and the well-settled presumptions of law to the question of the validity of titles to land grants arising under the treaties by which we acquired Louisiana and Florida, and the acts of Congress providing for the fulfillment of our obligations under those treaties is narrowed and limited by the following language, to wit:

"No claim shall be allowed that shall not appear to be upon a title *lawfully* and *regularly* derived from the government of Spain or Mexico or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one, that if not then complete and perfect at

the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound upon the principles of public law or by the provisions of the treaty of cession to respect and permit to become complete and perfect if the same were not at said date complete and perfect."

The question immediately arises, What is meant by the words "a title lawfully and regularly derived"? We have already seen that the word "laws" includes usages, customs, and principles of equity, and therefore it must follow that "a title lawfully derived" simply means one which was derived in accordance with the laws, principles of equity, and usages or customs which were recognized by and were in force in the country which made the grant at the time the same was made.

But the attorneys for the Government contend that the word "*regularly*" imports something more and additional into the statute. Fortunately, we also have the decision of this court as to the meaning of that word when applied to grants as in this statute.

In the case of *White et al. vs. Burnley*, 20 How., 247, this court said:

"The next question appears on the face of the grant. All the steps leading to the grant, with one exception, are regular. The quantity of land that the lines of survey include is equal to two leagues, whereas only one league is called for, and the reason the surveyor gives in his certificate of survey for the excess is that he included in the survey a bay of the ocean, which was not subject to grant, a quantity equal to a league. This statement was proved to be *untrue—almost entirely*. The grant contains two leagues and more of fast land, and for this reason it was insisted at the trial that it was fraudulent and void. But the court charged the jury to the contrary, with several qualifications. This we deem to have been useless, as our opinion is that a *regular* grant (that is, a completed title made by those exercising the proper political power to grant lands) is not open to

these objections by an opposing claimant setting up a younger title."

The court goes on to say how far the government of Texas might interfere in due course of law (that is, by a suit in its name and behalf) is a question for the Government to decide. *Owen vs. Rains'* lessees (5 Haywood's Tenn. R., 106) is to the effect that it can only be done by suit.

This court has here expressly defined the words "a regular grant" as being "a complete title made by those exercising the proper political power to grant lands." Applying this definition to the statute we are construing, it will follow that "*a title regularly derived*" would mean a *completed title* made by those exercising the proper political power to grant lands. In a case, therefore, where the claimant has a titulo which is executed in due form of law by an officer who was exercising the proper political power to grant lands, such claimant holds a title which was "*regularly derived*," and if, for any reason, it is subject to attack upon the ground of fraud in its issue, either on the part of the officer who made the grant or on the part of the grantee in securing the same, such attack can only be made in "due course of law."

In applying these principles to a patent from the United States, this court has said in the case of the *United States vs. Marshall Mining Company*, 129 U. S., at pages 588, 589.

"If the officers of that department of the Government have acted within the general scope of their powers and without fraud, the patent which has issued after such proceedings must remain a valid instrument, and the court will not interfere unless there is such a gross mistake or violation of the law which confers their authority as to demand a cancellation of the instrument."

And again:

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the

proceedings had in the land department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

The same principle was applied to a Mexican grant title by this court in the case of *Hornsby vs. U. S.*, 10 Wall., 237.

There is certainly nothing in the provisions of the act creating the Court of Private Land Claims which would require this court to adopt any different rule of law than those expressed in these quotations in determining the validity of the title and the boundaries in a Mexican grant in Arizona. The words in the first subdivision of section 13, that "the claimant would have a lawful right to make perfect had the Territory not been acquired by the United States," certainly do not change the obligations which were recognized by this court in the Florida and Louisiana treaties and the acts of Congress for carrying them into effect, for "*a lawful right to make perfect*" simply means *such a right as the granting Government would itself have recognized* according to the principles of equity, its laws, usages, and customs or ordinances. If such a right exists, this Government is bound to respect it. If the claimant would have had an equity under the granting government, then it must follow that he still has an equity under this Government, and he has a right of property which the faith and honor of this country has been plighted to respect, and this court will certainly not construe any act of Congress as intending to deprive him of any such right unless it contains words which unavoidably require such a construction.

What rights are the United States bound "upon the principles of public law or by the provisions of the treaty of cession" to respect and permit to become complete and perfect if the same is not at said date already completed and perfected? By the principles of public law, *all* property

rights are held inviolate. Can it be doubted for one moment that an equitable title to land, based upon the laws, usages, and customs of the country which made the grant, is a right of property which Mexico intended to be included within the term of the Gadsden treaty?

The Commissioner of the General Land Office, by his instructions to the surveyor general of New Mexico, on August 25, 1854, as published in "The Public Domain," at page 395, said:

"The treaty of 1848 between the United States and Mexico expressly stipulated in the eighth and ninth articles for the security and protection of private property. The terms there employed in this respect are the same in *substance* as those used in the treaty of 1803, by which the French Republic ceded the ancient province of Louisiana to the United States, and consequently in the examination of foreign titles in New Mexico you will have the aid of the learned decisions of the Supreme Court of the United States upon the titles that were based upon the treaties of cession and the laws of Congress upon the subject."

"The security of private property for which the treaty of Guadalupe Hidalgo stipulates is in accordance with the principles of public law as universally acknowledged by civilized nations."

He then quotes from the decision of this court in the case of the *United States vs. Percheman*, 7 Peters' Reps., as follows:

"The people change their allegiance; their relation to their ancient sovereign is dissolved, but their relation to each other and their rights to property remain undisturbed."

And, again, he quotes from this court in the case of *U. S. vs. Arredondo*, cited *supra*, as follows:

"The Supreme Court declared that Congress have adopted as a basis of all their acts the principles that the law of the province in which the land is situate is the law which gives efficacy to the grant and by which it is to be tested whether it was property at the time the treaties took effect."

I insist that the act creating the Court of Private Land Claims is as broad in its provisions as those which were enacted by Congress for the carrying into execution of the obligations of this Government under the treaties of Louisiana and Florida.

This court is directed by the act to be guided by the provisions of the treaty of Guadalupe Hidalgo, and the commissioner was certainly correct in stating that its provisions are the same "in substance" as those used in the treaty of 1803, by which the French Republic ceded the ancient province of Louisiana to the United States.

This act was originally introduced in the United States Senate in almost the identical form in which it was finally passed, by that learned lawyer, Senator George F. Edmunds, of Vermont. It is to be presumed he was familiar with the meaning of the words "lawfully" and "regularly," as already defined by the prior decisions of this court. It was recommended for passage by the Public Land Commission, which was appointed under acts of March 3, 1879, and June 16, 1880, by a report, in which that commission apologetically explained the long inaction of Congress upon these private land grant titles and acknowledged the injustice of the long period of delay which had been permitted to elapse.

It seems to the writer that it would require strong language, indeed, in this act to lead this court to adopt a construction of its provisions which would prevent the court from enforcing those principles of justice which have illuminated its decisions in the past.

This court has already said, speaking through Justice Shiras—

"We do not so regard that provision (referring to the provision of the act creating the Court of Private Land Claims) nor do we perceive in any features of the act an intention on the part of Congress to restrict the powers of the court recognized by the previous decisions."

In the case of *Fremont vs. United States*, 17 Howard, 541, Chief Justice Taney, in speaking for this court, said:

"It is proper to remark that the laws of these territories (Mexican) under which titles were claimed were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of the state of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of the statute, and the powers exercised under it by the tribunals or officers of the Government, it is often necessary to seek information from other authentic sources, such as the records of official acts and the practice of the different tribunals and public authorities, and it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge."

In *Hornsby vs. United States*, 10 Wall., 224, at close of the opinion, this Court said:

"By the term 'property,' as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this Court in the case of *Soulard vs. U. S.*, 4 Pet., 511, when considering the import of the term in a stipulation contained in the Treaty by which Louisiana was acquired, providing that the inhabitants of that territory should be protected in the enjoyment of their property. 'It comprehends,' said the Court, 'every species of title, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.'"

It can hardly be doubted but that the many able lawyers in both the Senate and House of Representatives in the Congress of this nation knew that in using the word "laws"

they were thereby importing into the provisions of the act creating the Court of Private Land Claims "all official customs and forms and usages."

POWER OF GRANTING OFFICER TO ISSUE TITLE.

We are met upon the threshold of this case with the question of the power of the granting officer to make this grant, and as an adverse determination of that question would necessarily dispose of the other two questions involved, I shall address myself first to its consideration.

POINT I.

Did the officer who made the grant transcend his powers in making it?

It will be observed, and I desire to emphasize the fact, that the question *is not*, "Did the officer have power to make the grant?"

On the contrary, the only question is, it being conceded that the grant was made and executed in due form of law by the officer possessing the proper political power to do so, has it been established as a fact or as a necessary conclusion of law that he transcended his powers in making the grant by reason of sufficiently gross irregularities in the steps preceding the execution of the grant to thereby make the grant null and void, *ab initio?* It will be observed that a majority of the members of the Court of Private Land Claims rejected the grant "for want of power of the officer attempting to make it," but an examination of the opinion clearly shows that the court rejected the grant *solely* upon the ground that the officer who made the "*sale*" of the land did not have power, under the laws, to conduct the "*sale*" *alone*. It is conceded, as I understand it, on the part of the Government, that the officer who *did* execute the grant, *i. e.*, who signed the titulo or patent which was delivered to the grantee, was

the proper officer to perform *that act*, and possessed *ample power* so to do in all cases where the proper preliminary proceedings had taken place. This raises a very different question, it seems to me, from the one of the mere power of the officer to make the grant.

It is a well-settled rule of pleading, which is uniformly applied in courts of equity, I believe, that the plaintiff must allege in his petition every material ultimate fact necessary to entitle him to the relief prayed for. Section 6 of the act creating the Court of Private Land Claims prescribes with some minuteness what it will be necessary for the petitioner to allege in seeking confirmation of the title to a grant under said act.

It will be noticed that the petitioner is required to state the date and form of the grant and by whom made, but he is not required to state the law or laws by which the grant was made or by virtue of which the officer executing the grant exercised that power. It seems to me that the absence of this requirement plainly indicates that it being once established that the grant or title paper (patent) was duly executed by an officer possessed of the proper political power to execute the same, every presumption will at once arise in favor of the validity of the acts of such officer; and if it is proposed to set aside, to annul, or to declare void that written instrument for fraud or mistake in the execution of the instrument itself, as was said by this court in the case of *United States vs. Iron Silver Mining Company*, 128 U. S., 677:

"The testimony on which this is done must be clear, unequivocal, and convincing, and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the position as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases the respect due to a patent, the presumption that all the

preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official documents, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof."

As was said by this court in that case:

"The Government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his lands is obtained in like manner. In this respect the United States, as a landed proprietor, stands upon the same footing with a private citizen. *The burden of proof in such cases is upon the Government.* The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the Government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

As was said by Mr. Justice Miller in the *Maxwell land grant case*, 121 U. S., 325:

"The deliberate action of the tribunals to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee demands that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the cause itself must be within the class of causes for which such instrument may be avoided."

In the case of the *Colorado Coal Company vs. United States*, 123 U. S., 307, patent for coal lands was alleged to have been obtained by false and fraudulent papers made by the register and receiver of the local land office, combining with others in a conspiracy for that purpose; but the court, after refer-

ring to the doctrine declared in the Maxwell land grant case, said by Mr. Justice Matthews:

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overturned only by full proofs to the contrary—clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish."

Authorities are then cited to show that in some instances the burden of proving a negative rests upon the complainant, and especially so when the negative allegation involves a charge of fraud against the party of whose conduct complaint is made.

In the case of *United States vs. De Lassus*, 9 Peters, 117, Chief Justice Marshall said:

"A grant or concession made by that officer who is by law authorized to make it carries with it *prima facie* evidence that it is within his power. No excess of them, no departure from them, is to be presumed. He violates his duty by such excess and is responsible for it. He who alleges that an officer entrusted with an important duty has violated his instructions must show it."

This principle becomes a very important one upon an examination of the facts and laws upon which the Government relies to nullify the grant in this case. It will appear from the laws which will hereafter be cited by the writer that at the time this grant was made by the Treasurer General of the Department of Sonora he was the proper officer to execute the title and was directly responsible for all his acts to the governor, who was the chief executive officer of the department and who possessed the power to appoint and remove the Treasurer General. It will further appear that the governor was by law the chief of the Treasury Depart-

ment and had general supervision of the same, and was the only and necessary conduit of communication with the supreme authorities of the Republic.

It will further appear that the commandant general of the army had the right to inspect the office of the Treasurer General as frequently as he saw fit, and that it was his duty under the law to report any abuses he might observe to the supreme government.

It will further appear that the Treasurer General was required to hold meetings of the Board of the Treasury, consisting of himself, the Attorney General of the Treasury, the principal collector of the revenues, and the auditor of the treasury, and the governor, as the presiding officer, at least twice a month, and that the duty of the Board of the Treasury was to procure the prosperity and increase of the revenues of the Treasury.

It will further appear that it was the duty of the governor to preside over the Junta de Alamoneda or board of auctions, which it is claimed on the part of the attorneys for the Government is the only political body or officer authorized to make the "*sale*" of this grant.

And it will further appear that it was the duty of the governor to witness in person the monthly and annual cash statements made by the Treasurer General. All these officials presumably had their offices in the same building then as now.

All these facts, together with the presumption in favor of the validity of the acts of an officer as just quoted, have a direct bearing upon the question now under discussion.

The Court of Private Land Claims held that:

"On the Board of Sales created under the decree of July 20, 1831, and that of April 17, 1837, *alone* was this power conferred," *i. e.*, the power to make "*sales*" of land.

The officer who made this grant assumed that because its appraised value did not exceed the sum of $500, he was

authorized to proceed *alone* in making the *sale*, and that it was not necessary to join with him the other members of the Board of Sales. From the facts just above recited, we are bound to presume that the governor, the Attorney General of the Treasury (if there was one), and the other members of the Board of Sales concurred in this view, of the power of the Treasurer General to make the *sale alone*. To hold otherwise is to presume that the Treasurer General committed a crime by withholding the $500 which was the proceeds of the sale from the treasury, and by withholding a statement of the source of the same from his accounts, or else we must presume that the Commandant General of the Army never performed his duty of inspecting the office of the Treasurer General, and that the Governor of the Department did not perform his duty of inspecting the bimonthly and annual cash statements made by the Treasurer General, or else that the governor still more grossly violated his duty by failing to report this abuse of authority on the part of the Treasurer General to the Board of the Treasury or to the supreme government, or by failing to remove the Treasurer General from office for this abuse of authority, or to take steps to annul the grant, or else, like Mr. Reynolds, we must presume *fraud*, in the absence of a single fact to base such presumption upon; and it has been universally held that *fraud*, like its near relative, *crime*, will *never be presumed*, but must be alleged and proven.

This grant was made in the month of April, 1844, and the granting officer recites in the titulo or patent the law of February 10, 1842, and article 73 of the law of April 17, 1837, as his authority for making the *sale* in the manner in which he did. (Record, p. 281.)

LAW OF APRIL 17, 1837, CONTRASTED WITH LAW OF JULY 20, 1831.

The law of April 17, 1837, was undoubtedly a comprehensive plan for the collection and disbursement of all the revenues of the National Government in the Departments. When the Constitution of 1824 was abolished and the Departmental system had, in 1835, been established, the law of October 23, 1835, provided that the governors and other subordinate officers of the States should remain in office, subject in the exercise of their functions to the Supreme Government of the Nation, and article 10 of that law provides that in everything relating to the Department of the Treasury the governor and respective officers should proceed in accordance with the laws, regulations, and orders of each State, in so far as they might be conformable with the new organization of said revenues and until the general Congress should adopt suitable measures for the future.

Section 14 of the law of October 23, 1835, provides that a law shall systematize the public exchequer in all its branches; shall establish the method of accounts; shall organize the tribunal for the revision of accounts, and regulate the economic and contentious jurisdiction in this department.

It is apparent that until the passage of said law of April 17th, 1837, *sales* of land in the Department of Sonora were to be made, if at all, by the said Treasurer General of the State, who had been continued in office by the laws just cited, and the report of Messrs. Flipper and Tipton upon the archives at Hermosillo demonstrates the fact that this was so understood by the officers whose duty it was to execute the laws, and that all grants made during the year 1836 were made by the same officer who had been the Treasurer General of the *State* and whose duty it had been under the *State* laws of 1825 and 1834 to make *sales* of land and *issue titles* thereto.

During the year 1836 this officer styled himself Treasurer General of the *Department* of Sonora.

By the law of April 17, 1837, the Congress of the nation attempted to systematize the public exchequer in all its branches, as was provided for in the basis for the new constitution. As under the law of October 23, 1835, the States had been abolished, and as the State officers were only expressly continued *temporarily* until the plan for conducting the new government could be formulated by Congress, it would naturally follow that as soon as this new plan was formulated all of the said *State* officers ceased to exist officially, as the reason for their continuance was eliminated; and it would also seem that all *National offices* not expressly continued would also cease to exist the moment the plan adopted for the new government provided for other offices and officers to conduct the business which had been carried on by the former offices and officers.

If I am correct in this view, it would also follow that all the laws of the former *State and National* Governments which are not expressly continued in force, and *which related solely to the powers and duties of officers*, would likewise also cease to be in force. Moon v Sheinbaugh, 127 US 70-5, Lees, Valley v Bank 3 Colo 17-23

Counsel for the Government, at page 42 of their brief in case of Santiago Ainsa *et al. vs.* United States, No. 429, October term, 1895, of this court, say:

"It is a rule of construction in all countries governed by the civil law that repeals by implication are favored, and that a subsequent law upon the same subject repeals a former law by implication unless by the terms of the latter law the former is kept in force. Hence the necessity of providing, as does the decree of April 17, 1837, that the regulations of July 20, 1831, should remain in force except where it was repugnant to the terms of the latter."

Article 73 of the law of April 17, 1837, reads as follows, to wit:

"All the purchases and sales that are offered on account of the Treasury and exceed five hundred dollars shall be

made necessarily by the Board of Sales, which, in the capital of each Department, shall be composed of the Superior Chief of the Treasury, the Departmental Treasurer, the First Alcalde, the Attorney General of the Treasury, and the Auditor of the Treasurer, who shall act as Secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the Board, and a copy thereof shall be transmitted to the Superior Chief of the Treasury for such purposes as may be necessay and to enable him to make a report to the Supreme Government."

Were it not for the fact that the regulations of July 20, 1831, in so far as they are "not opposed to the decree of April 17, 1837, and subsequent laws," are expressly continued in force, we would have no difficulty in reaching the conclusion at first glance that in the year 1844, under the laws hereinbefore cited, the Superior Chief of the Treasury of the Department of Sonora had full power to make all the purchases and sales on account of the Treasury that do not exceed the sum of $500 without calling upon the other members of the Board of Sales to assist him in making such purchase or sale.

I contend that it *is* the plain intention of this law of April 17, 1837, to confer such power upon the *Superior Chief of the Treasury*, and that it consequently existed in the *Treasurer General* at the time this grant was made by virtue of the law of December 16, 1841, which abolished the office of Superior Chief of the Treasury and imposed the duties and powers of that officer upon the Treasurer General.

In the law of July 20, 1831, there is a particular provision which was held by the Court of Private Land Claims to be still in force and to prevent the Treasurer General of the Department from acting *alone* in making a *sale* or *purchase* on account of the Treasury when the amount of the purchase or sale did *not* exceed the sum of $500.

The article, No. 126, reads as follows, to wit:

"All purchases, sales, and contracts made on account of the Treasury, whatever be their purpose, shall be made by the Commissaries General, sitting as Boards of Sale, but before convoking them it shall be absolutely necessary to receive first the order therefor, either from the Supreme Government, communicated directly or through the Treasurer General, or rather from the Directory of Revenues, when it relates to matters subject thereto."

Also Article 127:

"Said board shall hold its sessions in the room most suitable for the purpose in the Commissariats, or in the public place nearest to those offices, and the regular members shall be the *Commissary* or Subcommissary, who shall preside, the *Senior Officer of the Treasury*, or the one who acts in his stead, *and the Attorney General, where there is one*, and each of these employés shall take the place or seat to which he is entitled in the order in which they are named."

It will be noticed that Article 73 of the law of April 17, 1837, provides that the sales and purchases *exceeding five hundred dollars* shall be made *necessarily* by "*the*" Board of Sales. It then goes on to provide that "*the*" Board of Sales shall be composed of certain officers. Had the law provided that "a" Board of Sales should make all such purchases and sales and should be composed of those officers, there would be more excuse for holding that in adopting this comprehensive measure to systematize the public exchequer in all its branches the Congress of the nation had intended that there should be *two* Boards of Sale, *possessing exactly the same name* as a designation of their offices, and only to be distinguished from each other by some such nickname as the "little" Board of Sales and the "big" Board of Sales.

It is difficult for me to understand, however, by what process of reasoning the conclusion could have been reached that, after the Federal Government had been abolished and an entirely new and distinct government had been established in its place, and a complete system had been adopted

by that new government to systematize every branch of the public exchequer, the fact that those parts of the regulations of July 20, 1831, were continued in force which are not opposed to the decree of April 17, 1837, can be construed as including the *Board of Sales* provided for in those regulations of 1831; and especially is such a construction difficult to understand in view of the fact that this very law of April 17, 1837, abolishes the office of Commissary General and imposes all the functions of that office upon the presiding officer of this *new* Board of Sales, to wit, the Superior Chief of the Treasury, or, as has already appeared, his successor, the Treasurer General of the Department—the officer who made this sale.

Regulation 126 did not create a Board of Sales as such for any specific purpose, but simply provided that the Commissary General when making purchases, sales, and contracts on account of the Treasury should call to his aid certain other officers, to wit, the *Attorney General* of the Treasury, if there was one, and the *Senior Officer of the Treasury.*

By the law of 1837 the office of *Commissary General* was *abolished,* and the "Senior Officer of the Treasury," to wit, *the Superior Chief of the Treasury,* is himself invested with the powers and duties of said *Commissary General,* as well as with many other new and important duties.

Section 4 of the act of April 17, 1837, provides that all the employés of the treasury shall be *subordinate* to the *Superior Chief* of the same. He is, therefore, undoubtedly the "Senior Officer of the Treasury." Hence if the Board of Sales provided for in the law of July 20, 1831, is to be convoked, it will no longer be composed of more than *two* members, to wit, the Superior Chief of the Treasury, or, at the date of this grant, his successor, the *Treasurer General, and the Attorney General* of the Treasury. But by the law of July 20, 1831, all matters before this Board were to be determined by an absolute majority vote, and the *Attorney General*

of the Treasury was to constitute a member of said Board of Sales only "*where there was one.*" It must follow, therefore, that if there is no Attorney General *at the time* located *in the place where the Treasurer General was about to act in making any purchase or sale* on account of the Treasury, the *Treasurer General will* at once become a corporation sole and will *himself constitute the Board of Sales.*

This would seem to me to lead to absurd results, if we are to adopt the view taken by the Court of Private Land Claims on this question. It seems plain to my mind that there was a good and substantial reason for requiring that all sales and purchases made on account of the treasury by the *Commissary General* should be made by him in the presence of and with the approval of certain other officers. During the time of the Federation, the duties of the Commissary General were very limited as compared with those of the Superior Chief of the Treasury and of the Treasurer General under the Departmental system. In the first place it does not appear by any evidence before this court that after the year 1826 the Commissary General ever exercised the power of selling vacant public lands, the performance of which duty by the Treasurer General necessarily imposed more labor than any other duty he was required to perform; and it quite conclusively appears from the report of Messrs. Flipper and Tipton, above referred to, that the Commissary General did not exercise the power of making grants of lands between the years 1826 and 1837, the date of this law, whether he actually possessed such power as a matter of law or not. The sales and purchases of other things which the Commissary General was required to make must necessarily have been exceedingly limited as compared with those it became the duty of the Superior Chief of the Treasury or Treasurer General to make under the Departmental system. Hence it may have been quite easy, from a practical standpoint, for the Commissary General to have convoked a Board of Sales every time it was necessary for him to make a purchase on

account of the treasury or to make a sale of property, regardless of the question as to whether the purchase was that of a box of pens costing fifty cents or the sale was that of an old desk worth two or three dollars. But what might have been a hardship in the case of the Commissary General, in the exaggerated instances used as an illustration, would become an absolute embargo upon the expeditious conduct of affairs if enforced in the office of the Superior Chief of the Treasury or of the Departmental Treasurer under the new system of government. It seems to me plainly apparent that it was the intention of Congress to intrust the making of all sales and purchases, where the amount did not exceed the sum of $500, to that National Officer, who was made by this law of 1837 the Senior Officer of the Treasury, with the duty of holding meetings of the Board of the Treasury at least twice a month, and of exercising his talents by and through that board "to procure the prosperity and increase of the revenues of the treasury, the most easy and prompt collection thereof, to promote the economies that should be made, and to make a report to the Board of bad management or failure to comply with their duties, and other omissions on the part of the employés of the Treasury Department which might come to his knowledge." Minutes were required to be kept of the doings of this board, and in all matters where the amount involved exceeded five hundred dollars the Government thus had the complete record, whereas in those purchases and sales, constituting vastly more numerous transactions, in which it was necessary to have prompt action, the Government could safely rely upon the accounts which were required to be kept by the *subordinates* of the Superior Chiefs of the Treasury, and especially when the Governor of the Department, who was himself necessarily appointed by the Chief Executive of the Nation, was vested with power and was required as a matter of duty to inspect these accounts every month, and when the Commandant

General of the army was likewise authorized to inspect said accounts at any time.

And we should not lose sight of the fact that from 1825 to 1835 the Treasurer General possessed and exercised the power of making *all sales of land alone* under the State laws.

But there is still another circumstance which makes it plain to my mind that the Board of Sales provided for under the law of July 20, 1831, was intended to be abolished by the law of April 17, 1837. Said Article 126 of the Law of July 20, 1831, further provides that before convoking the Board of Sales "it shall be absolutely necessary to receive first the *order* therefor either from the Supreme Government, communicated *directly*, or through the Treasurer General, or rather through the Directory of Revenues when it related to matters subject thereto."

And section 133 of said law of July 20, 1831, provided that—

"After the legal term has expired the Commissaries and Subcommissaries shall forward the proceedings with their report thereon to the Supreme Government, *without whose approval* the purchase, sale, or contract shall not be carried into effect."

Is it reasonable to suppose that in all cases where a sale or purchase was to be made on account of the treasury, which *would not exceed* the sum of $500 in amount, and which *might not exceed* the trifling sum of one dollar, Congress intended that the Superior Chief of the Treasury could take no action without first receiving from the Supreme Government an *order* to convoke the Board of Sales for the purpose of having it make such purchase or sale; whereas if the amount *did exceed* five hundred dollars, said Superior Chief of the Treasury could convoke the Board of Sales *upon his own motion* and *without any previous order*, and said board could proceed to make *such* purchase or sale, and *thus expend*

an unlimited sum of money, or *thus dispose of any property owned by the Government, however valuable?* Or, is it reasonable to suppose that when the amount of said purchase or sale *did not exceed* five hundred dollars and was, perhaps, trifling and insignificant, the purchase, sale, or contract should *not* be carried into effect *without the approval of the Supreme Government;* whereas, if the amount *did exceed five hundred dollars*, however large it might be, *the approval of the Supreme Government was not necessary?* For said law of April 17, 1837, does not even require that a report upon sales or purchases made by said Board of Sales provided for in that act must necessarily be made to the Supreme Government, and the only report necessary, as provided by that act, was to the Governor of the Department, who was himself the presiding officer of the Board of Sales under the amendments to the law of 1837, which were passed prior to the sale of this grant.

Or is it reasonable to suppose that the *order* must be communicated *directly* to the Treasurer General of the Department if the sale or purchase is for *less* than five hundred dollars, and that the Governor of the Department must be the *sole* avenue of communication when the sale or purchase is for a greater amount than five hundred dollars?

Some of the provisions of said law of July 20, 1831, are clearly *not opposed* to the provisions of the decree of April 17, 1837, or any subsequent laws on that subject, and *those* provisions of said law of 1831 are eminently proper ones to have been continued in force and seem to have been recognized as in force by the granting officers, and are undoubtedly the ones referred to in said law of 1837 as being continued in force in so far as they are not opposed to it.

For instance, the provisions of Article 130 of said law of 1831 were complied with by the Treasurer General of the Department in making this grant, as is shown in the recital already quoted therefrom, to wit, by having two witnesses at the sale on account of the absence of a notary public.

Article 134 of said law is clearly not opposed to said decree or any subsequent law, and is just as clearly one which it was eminently proper to continue in force, for it is intended to prevent any officer who takes part in a sale or purchase from buying from himself or selling to himself.

As applied to the sale of lands, the Congress of Mexico had a precedent for this rule providing that *when a sale exceeded in value a certain amount* additional safeguards should be thrown around the sale, for as early as March 23, 1798, it was provided by the Royal Cedula that when the purchase price of land sold by the intendente did not exceed two hundred dollars the transmittal of the title to the Superior Board of the Treasury for confirmation should be dispensed with, although the confirmation by said Board was absolutely necessary to the validity of a title to land *when the purchase price did exceed said sum of two hundred dollars.* (See Reynolds, page 29.)

In order to expedite the transaction of business, provisions of a similar character are very common under all the municipal governments of the United States; and we find similar provisions in many State laws.

For instance, when an officer or a board is authorized to purchase supplies and let contracts for any municipal government, it is usually provided that in all cases where the amount of the purchase or contract exceeds a certain sum, like five hundred dollars, the contract or purchase shall be made by advertising for sealed bids and opening the same at a certain time and place; whereas in all purchases and contracts involving a less sum of money the officer or board is authorized to act without these safeguards against collusion in the purchase or contract or against fraud on the part of the officer. But, besides the presumption that any grant or concession made by that officer who is by law authorized to make it carries with it *prima facie* evidence that it is within his power, and while, in my opinion, the burden is upon the Government in this case to show that the granting offi-

cer violated the law in making the grant, we have the additional effect of the weight which must be given to the fact that the officer whose duty it was to act under the law of April 17, 1837, in making this grant gave it the interpretation which we contend is correct.

INTERPRETATION PLACED UPON THE LAW BY OFFICER WHOSE DUTY IT IS TO ACT UNDER IT RAISES A STRONG, IF NOT A CONCLUSIVE, PRESUMPTION IN FAVOR OF HIS AUTHORITY TO ACT.

In the case of *Edwards vs. Darby*, 12 Wheaton, 206, this court said:

"It is urged that the commissioners appointed by the act of 1782 were not authorized to cause surveys to be made of the reservation of 640 acres around the reserved salt licks and springs; that the reservation was by quantity only, and that no legal effect can therefore be attributed to the survey. We admit the statute does not give the authority to survey the reservation in express terms, but we do not admit that the authority may not come and does not result by necessary implication from the duties that they were expressly required to perform and from the general provisions of the statute."

"In the construction of *a doubtful or ambiguous law* the *contemporaneous construction* of those who were called upon to act under the law and were appointed to carry its provisions into effect *is entitled to great respect.*"

And in the case of the *United States vs. Moore*, 95 U.S., 760, this court said:

"*The construction given to a statute by those charged with the duty of executing it * * * should not be overruled without cogent reasons.* * * * The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

And in the case of *U. S. vs. Pugh*, 99 U. S., 265, this court said:

"While, therefore, the question (the construction of the abandoned and captured property act) is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of Claims and the Executive for so long a time."

And in the case of *Hornsby vs. U. S.*, 10 Wall., 224, this court said:

"*We cannot without doing injustice to individuals give to the Mexican laws a more narrow and strict construction than that received from the Mexican authorities who were entrusted with their execution.*"

These principles of law have been frequently recognized and reasserted by this court. But the interpretation placed upon these laws by the officer whose duty it was to act under them in this case derives much additional strength and becomes, if possible, still more conclusive presumption in favor of his power from the fact that in Mexico there are not only no published reports of judicial decisions which show the received or proper construction of any of its State laws, but the courts of that nation had no power to interpret a law, and its proper construction and interpretation therefore necessarily devolved upon the executive officers whose duty it was to act under them.

THE POWER TO REFORM OR ANNUL TITLES WAS VESTED IN THE POLITICAL AND NOT IN THE JUDICIAL DEPARTMENT IN MEXICO.

"Under our system of government," as this court said in the case of *Stone vs. U. S.*, 2 Wall., 525, "one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a *judicial* act, and *requires the judgment of a court.*"

In *Mexico*, however, the *law is directly to the contrary.*

This court said in the case of *White vs. Burnley*, 20 How., at page 247:

"*Under Spanish and Mexican governments the judiciary had no authority to interfere in any case. The political power retained to itself all the power to reform or annul titles.*"

The constitution of Sonora and Sinaloa, comprising the State of the West, contains the following provisions, to wit:

"The tribunals and courts of justice, being authorized solely for *applying* the laws, *shall never interpret the same* or suspend their execution."

On pages 83, 84, 85, 86, and 97 of the printed official report on the condition of the archives or records of the titles of land grants in Arizona, which were made by Messrs. Flipper and Tipton, special agents of the Department of Justice, we find a letter from José Maria Mendoza, as Superior Chief of the Treasury of the Department of Sonora, to the Secretary of State of the Republic, which contains, among other things, the following statement, to wit:

"My predecessor, Ygnacio Trealles, came to believe that said authorities and the Treasurer (the Superior Chief of the Treasury and the Treasurer General and other members of the Board of the Treasury) *exercised judicial functions* under those decrees."

Mendoza was here referring to the laws under which the Treasury Department of Sonora was making grants of land, and he was requesting the Secretary of State of the Department of the Treasury of the Republic to advise him as to how he should proceed in doubtful cases, and as to who should decide upon the proper construction to be given to the laws in relation to grants of land whenever he, as Superior Chief of the Treasury of said Department of Sonora, should be in doubt.

The reply of the Secretary of State is published on page

88 of said report of Messrs. Flipper and Tipton, and it instructs said Mendoza, as Superior Chief of the Treasury, to *refer all doubtful questions to the Board of the Treasury for decisions, and to be guided by its decisions.*

Hence if there is any doubt about the proper construction to be given to these two laws of 1831 and 1837 in order to determine the question as to whether the granting officer in this case had the power to make the sale of the land in the manner in which he did, that doubt must be resolved in favor of the interpretation which was placed upon the laws by the officer whose duty it was to act under them, to wit, by the Treasurer General, who was the granting officer in this case, not alone by reason of the fact that *his contemporaneous construction would be entitled to great respect, looking at him simply as an executive officer,* under our system of government, where doubtful laws are construed and interpreted by the courts; not for the additional weighty reason that *in Mexico* the court being restrained from interpreting or construing laws and the executive officer being necessarily required to interpret all laws under which it is his duty to act, it must follow that *the interpretation placed by him upon any such law is in effect a judicial decision upon its proper construction,* at least until said officer's interpretation is overturned by the decision of a higher executive officer or by a legislative enactment differently construing said law.

In this case it has been seen that the interpretation and construction placed upon said laws by said Treasurer General in making this grant must be presumed to have come under the inspection of the governor, who was the Chief Executive Officer of the Department, as well as under the inspection of said Board of the Treasury, whose duty it was under said instruction from the Secretary of State to decide such questions. In the absence of a showing to the contrary, if there is any doubt about the power which was exercised by said Treasurer General, the presumption that every officer

performs his duty must lead us to the conclusion and to the presumption that said Board of the Treasury passed upon the question of the proper interpretation and construction of said laws, and that said Treasurer General acted in accordance with its said decision.

NATIONAL GOVERNMENT OF MEXICO ACQUIESCED IN SALE AS MADE.

As was said by this court in the case of *Gonzales vs. Ross*, 120 U. S., 616:

"Besides, the commissary was a public officer having an important duty to perform, and, in the absence of evidence to the contrary, *the presumption would be that he acted in accordance with the law as known at the time.*"

And again, as said by this court, at page 619, in said case:

"A strong circumstance in favor of this conclusion is the fact that Soto's official acts as committed in this case were never repudiated by the Government; but, on the contrary, his protocol was received and deposited in the public archives, where it still remains. His official acts, accepted and acquiesced in by the governor, must be considered as valid, even if done by him only as a commissioner *de facto*."

And again, at page 622:

"All favorable presumptions will be made against the forfeiture of a grant. As before said, it will be presumed, unless the contrary be shown, that a public officer acted in accordance with the law and his instructions. The Government accepted Soto's acts, and it does not appear that any attempt was ever made to revoke or annul the proceedings or to obtain a forfeiture for the cause now insisted upon. * * * On the whole, we think it clear that Fortunato Soto had authority to extend the title in question, or at least that his official acts were acts acquiesced in by the Government, and are to be considered as valid."

As was said by the Supreme Court of Texas in the case *Hanrick vs. Jackson*, 55 Texas, 17, and quoted by this court with approval:

"The presumption which is always indulged in favor of the validity of the acts of officers of a former government warrants the conclusion that the officer acted in conformity with law and not in violation of it."

So in this case the expediente was deposited in the public archives and remained there at least until after the date upon which this Government acquired the territory within which this land lies, to wit, for a period of about ten years, during which the Government of Mexico must be presumed to have acquiesced in the action of said Treasurer General in making said sale in the manner in which he did. Not only did said expediente remain in the archives, but the National Government of Mexico received and retained the $500 which was paid by the purchaser of this grant for the land, and the accounts of its public officer must be presumed to have shown the source from which said money was received.

Not only is this true, but it is impossible to conceive how it was possible for thirty notices of sale to have been made and for the notices of the three public auctions to have likewise been made without the Chief Executive Officer of the Department having received notice of the act of the Treasurer General in this matter. And if article 131 of said law of July 20, 1831, was still in force, it must be presumed that the notice of sale was published at least eight days before the sale, by placards put up in the most public and frequented places, and that it was also published by a notice inserted for the same length of time in the newspaper of greatest circulation in the place at which the sale took place, provided there was a newspaper in said place.

It is not possible that the General Government of Mexico was ignorant of this grant. For ten years prior to the treaty

it remained of record in Mexico, and for at least three years prior to the treaty the *cestui que trust* of the original grantee was in open and notorious possession of the grant; and as was said by this court in the case of *United States vs. Castro et al.*, 24 Howard, 350:

"The survey and possession of a grant are open and public acts and would support the parol evidence of its prior existence and destruction. It would show the knowledge of the officers of the Government of the title claimed and their acquiescence in the justice and legality of the claim."

Will a court of equity at this late day, after the lapse of nearly half a century, during which time the grantee has been in open and notorious possession of the land, and has expended vast sums of money in improving the same, and in defending his possession against the attacks of the savage Apaches, *so construe a doubtful law* (to put the case most strongly for the Government) *a to overturn the contemporaneous interpretation which was placed upon it by the officer whose duty it was to act under it*, and thus cause a forfeiture of land which was purchased by the grantee in good faith for a valuable consideration? I cannot believe it possible.

IF ARTICLE 126 OF LAW OF JULY 20, 1831, IS STILL IN FORCE THE TREASURER GENERAL WAS NEVERTHELESS AUTHORIZED TO MAKE THIS SALE ALONE.

If it be held, however, that said Board of Sales created under the law of July 20, 1831, was still in existence, I insist that under said law said Board was necessarily composed only of the Treasurer General of the Department and the Attorney General of the Treasury at the time this sale was made. I further insist that *if there was no Attorney General of the Treasury at the place where the sale was made*, then the Treasurer General was authorized to proceed alone in making the sale.

It must be presumed that the Treasurer General performed his duty; and if no Attorney General was present at the sale, *it must be presumed that it was because there was none at that place.* But, fortunately, we are not compelled to depend entirely upon presumptions upon this question, for we have absolute record evidence of the fact that on February 23, 1839, there was no Attorney General in the Department of Sonora, and likewise that there was no notary public there.

Article 130 of said law of July 20, 1831, reads as follows, to wit:

"If there is a notary public *in the place*, he shall necessarily be present at the sessions of said board, and whatever is done therein shall be certified to by him or by two attending witnesses, in case there is none."

It is a significant fact that the title paper in this case contains the following recital, to wit:

"I, the undersigned, Departmental Treasurer, being in the office of this treasury under my charge, with my attending witnesses, Don José Maria Mendoza and Don Vicente Irigoyen, in the absence of a notary public, in compliance with the provisions of article 73 of the law of April 17, 1837," etc.

Hence we see that the granting officer complied with the requirements of article 130 of said law of July 20, 1831.

We should also notice and bear the fact in mind that José Maria Mendoza, who preceded this granting officer as the Superior Chief of the Treasury, was one of the assisting witnesses at this sale. (Record, p. 282.)

Said José Maria Mendoza was the Treasurer General of the Department of Sonora at the time the decree of February 10, 1842, was published, and he succeeded this granting officer as the Treasurer General of Sonora early in the year 1845, less than one year after this grant was made, as is shown by said report of Messrs. Flipper and Tipton.

The long career of said Mendoza as the Senior Officer of the Treasury of both the State of Sonora and the Depart-

ment of Sonora, and the care displayed by him in securing advice from the Supreme Government before proceeding to perform any important official act, lends additional weight to the correctness of the interpretation which was placed upon these laws of April 17, 1837, and February 10, 1842, by the granting officer in this case.

The letter of said Mendoza, as Superior Chief of the Treasury of the Department of Sonora, to the Secretary of State and of the Department of the Treasury at Mexico, was dated February 23, 1839, and the reply thereto by the Secretary of State and of the National Treasury Department was dated December 21, 1840. If there was any doubt, therefore, about the power of the Treasurer General to make this sale *alone* under said law of April 17, 1837, it is fair to presume that said Mendoza would have warned Lopez, the granting officer in this case, of that fact; and it is also fair to presume that when said Mendoza again became the Treasurer General of the Department at Sonora, in the year 1845, he would at least have called the attention of the Supreme Government to the doubtful validity of the title to this grant through the proper officer of the Supreme Government.

The letter of said Mendoza just referred to contains evidence of the fact that there was no Attorney General at Ures, the capital of the Department of Sonora, at the time said letter was written, in the year 1839. It contains the following statement, to wit:

"At the present time I consider the office of Superior Chief of the Treasury, which I hold as isolated in such cases, in my opinion. It has no legal adviser to counsel in the different branches and business under its charge, and particularly in that of lands, which is serious and important and which many times undoubtedly require it in order to avoid a conflict between the fact and the law and in order to act without delay with the precision and certainty possible. *Likewise it has no attorney nor notary public because there are none.* And finally this office also lacks the Treasury Board referred to in Art. 74 of the supreme decree of April 17, 1837,

for the reasons I mentioned to you in official letter No. 6 of this date."

When a certain condition of affairs has been shown to exist, the same condition must be presumed to continue until the contrary has been shown to be the fact. The affirmative evidence contained in the letter of Mendoza, that there was no such officer in that department in 1839, and that there was no notary public at that time, coupled with the further affirmative evidence contained in the recital just quoted from the title papers in this grant, that there was no notary public at Guaymas, the place of sale, in 1844, together with the presumption that an officer has done his duty, and that therefore the Treasurer General would have called the Attorney General to his aid in making said sale if he was required by law so to do, and, *if there was one at that place*, establish to my mind the fact that there was no Attorney General at Guaymas at the time of said sale, and therefore establishes the power of the Treasurer General to make the sale alone, as he did, even if the Board of Sales provided for in the law of July 20, 1831, was still in existence at the time of said sale.

DECREE OF FEBRUARY 10, 1842.

Article 1 of this law provides that—

"The Boards of Sale in the several departments will proceed to sell, at public auction, to the highest bidder, the properties (fincas) situated therein that pertain to the Department of Temporalities."

But it is contended on the part of the Government, and was held in the Court of Private Land Claims, that even if the Treasurer General of the Department of Sonora, who made this grant, did possess the power to make sales of vacant public lands when the value of the same did not exceed the sum of five hundred dollars, without requiring the

other members of the Board of Sales to act with him, he did not have power to make a sale of a *temporality*, for the reason that the decree of February 10, 1842, expressly confers the power to make sales of temporalities upon the Board of Sales only.

It seems to me that the Court of Private Land Claims was led into this error by a failure to carefully examine said decree of February 10, 1842, and the recital in reference to the same which is contained in the title papers of this grant. That decree was not the enactment of a law by the Congress of the Republic, but was merely an *executive order* from the President of the Republic.

It does not purport to be a *grant of power* to the Board of Sales to sell temporalities, but is in terms simply *a direction* and *a demand* that they shall *proceed* to make such sales, at public auction, to the highest bidder, after first appraising the same in a certain manner.

In the original decree as found in the Compiled Laws of Mexico, vol. IV, page 114, No. 2282, we find the following language, which does not appear in the translation given by Mr. Reynolds, to wit:

"Therefore I order this to be printed, published, and circulated, and *demand* that it be complied with."

This order was not accompanied or followed by any regulations, and hence the regulations of April 17, 1837, which were still in force, were properly followed in making the sale. It will be seen by the recitals in the title papers that this sale was made at public auction, to the highest bidder, after the grant had first been appraised by the Treasurer General's office in the proper manner.

Other Presidential orders for the sale of temporalities had previously been made. The law of May 10, 1829 (Compiled Laws of Mexico, vol. 2, page 108), is a Presidential order to the Commissary Generals. It ordered and directed them to sell temporalities at auction because they are becoming

deteriorated by being rented, and requires said Commissary Generals to make reports of the condition of all temporalities within their jurisdiction. This order demonstrates the fact that the Commissary General had been renting and leasing the public property of the nation by virtue of the laws of September 21, 1824; and yet it would be difficult to point out any particular section of that law which *expressly* grants to him any such power, if we are *always* to be required to find *express* language making such a grant of power, as is suggested in the opinion of the Court of Private Land Claims in this case.

The law of May 21, 1831 (Compiled Laws of Mexico, vol. II, page 329), provides that there shall be the office of Commissary General in the State of Sonora. The first duty imposed upon the Commissary General by this law is that of collecting money belonging to the Federation, in compliance with orders emanating from the general Treasury, including the power to make grants of land, which are continued in force, except as to the collection of revenues from tobacco and powder. Hence the Commissary General of the State of Sonora had power and authority to sell temporalities at auction, and said Presidential order of May 10, 1829, directing all Commissary Generals to do so was still in force, as the same had never been revoked, and was not opposed to any subsequent law on the same subject.

Article 10 of the circular of July 7, 1831 (Compiled Laws of Mexico, vol. II, page 341), provides that the Treasury Department shall take an exact account of the number, location, condition, and present method of administering all the property of the nation, in which is included those of the *temporalities*, and provided that said department shall see to the collection of the proceeds from said property, and that it shall do whatever it conceives to be most efficacious in regard to the *sale*, lease, or administration that may be advisable, in whole or in part, of the property in question.

Hence it will be seen by this order that the Commissary

General of Sonora was directed to do whatever he considers most beneficial in regard to the *sale* of *temporalities*, and said order of May 10, 1829, to sell temporalities at auction was still in force and was in no way opposed to this later order.

These orders were never revoked nor repealed up to the date of the passage of the law of April 17, 1837, which abolished the office of Commissary General and imposed the functions and powers of that office upon the Superior Chief of the Treasury of the Department of Sonora.

Hence it will be seen that the Superior Chief of the Treasury of the Department of Sonora already possessed power to sell temporalities at public auction under the orders just cited, which had not been revoked.

By the decree of December 16, 1841, the office of Superior Chief of the Treasury, which was created by said decree of April 17, 1837, was abolished and the Departmental Treasurer was vested with the powers and authority previously exercised by said Superior Chief of the Treasury. Hence it follows that at the date of said decree of February 10, 1842, the Treasurer General of the Department of Sonora, who made this grant, possessed the power to sell temporalities at public auction under said orders of May 10, 1829, and July 7, 1831, and if the value of said temporalities did not exceed the sum of five hundred dollars said Treasurer General had the power to sell the same without convoking the Board of Sales, as we have just seen.

Hence when the well-known embarrassed condition of the national Treasury compelled Santa Ana to not only direct, but to *demand*, that the Boards of Sale in the several departments should proceed to sell the temporalities situated therein, it became the duty of the *chief officer* of the Treasury in each department to proceed to carry out the spirit of this *order and demand* of the supreme executive, and to have all temporalities within his jurisdiction immediately appraised in the manner set forth in said decree; and upon said appraisement being completed, it became his duty to

convoke the Board of Sales and to require it to immediately proceed to sell all those temporalities the appraised value of which exceeded $500; and it was likewise his duty, within the *spirit* of said order, to immediately proceed to personally sell all those temporalities whose appraised value did not exceed said sum of $500 without convoking said Board of Sales.

But it must also be borne in mind that the Governor in each department was by article 14 of the decree of June 13, 1843, made the only necessary conduct of communication with the Supreme Government.

And by subdivision 10 of Article 142 of said law the Governor was made the chief of the public Treasury of the department, with general supervision of the same.

By Article 140 of said law it was the duty of the Governor to publish the decrees of the President, and to cause them to be complied with within the territory in which he exercised his powers; and under the laws just quoted and the holding of this court in White *vs.* Burnley, cited *supra* it was also the duty of said Governor to *interpret*, as well as to cause the execution of all decrees, orders, and laws.

And under Article 1 of the law of December 7, 1837, it was made the duty of the Governor to preside over the Board of Sales and the Board of the Treasury, and under Article 75 of the law of April 17, 1837, it was made the duty of the Board of the Treasury "to procure the prosperity and increase of the revenues of the Treasury, the most easy and prompt collection thereof, to promote the economies that should be made, to expedite such grave matters of difficult solution as the Superior Chief, and afterwards his successor, the Treasurer General," etc.

It must also be remembered that in all cases of doubtful construction of laws, orders, and decrees in regard to the sale of lands the Treasurer General had been instructed by said letter of the Secretary of State and of the Treasury Department of the Republic to said Mendoza to submit such

matters for decision to said Board of the Treasury and to be guided by its decisions.

It will be noticed that the sale of these temporalities did not take place until more than two years after the appearance of said decree of February 10, 1842. It will also be noticed that in reciting his authority for making the grant the Treasurer General does not state that he makes the sale by virtue of a power or authority *vested* in him by said decree of February 10, 1842, but simply recites that—

"Whereas said decree provided for the sales, on account of the critical condition of the public Treasury, of the properties pertaining to the department of temporalities, to which class is this grant, said grant being valued at the sum of $500, as provided in Article 2 of the aforesaid supreme decree of February 10, 1842, and complying punctually therewith, I have ordered the formation of the corresponding expedientes in the court of the first instance and of the Treasury of the district of San Ygnacio, during which no bidder appeared:

"Therefore, and in compliance with Article 73 of the law of April 17, 1837, as the sale in question on account of the national Treasury does not exceed $500, this said Treasury proceeded with the public sale of the aforementioned lands," etc.

The granting officer plainly states that in making the sale he has complied with Article 73 of the law of April 17, 1837, and has made the sale without convoking the Board of Sales for that purpose, *because the value of the land does not exceed $500;* and he likewise plainly states that the sale is made because said decree of February 10, 1842, provides for the sale of temporalities on account of the critical condition of the public Treasury. If the contention on the part of the government, that there were two Boards of Sale still in existence in 1844, is correct, then it necessarily follows that said decree of February 10, 1842, if it is to be construed as a grant of power to make the sale, applies as well to the "little" Board as to the "big" Board, and hence it has been

seen that the Treasurer General was thereby authorized to make this sale alone, in the absence of an Attorney General from the place of sale.

But in view of the history of the times, and in view of the wording of said order or decree, and in view of the fact that the Governor is the only source of communication with the supreme government and was the Chief of the Treasury of the Department and was the presiding officer of said Board of the Treasury, whose duty it was to promote and expedite the collection of the revenues, it seems to me that if any order was necessary to enable the Treasurer General to act alone in selling temporalities where the value did not exceed the sum of $500, it must be presumed in favor of the validity of his acts; that such order was received from the proper source by the Governor and was communicated to the Treasurer General by him; or, if a doubt existed at the time as to his power to make the sale in question, it must be presumed that this question was submitted to the Board of the Treasury for its consideration and determination, and that said Treasurer General acted in making said sale in accordance with the decision of said body.

Again, we should bear in mind the fact that said Mendoza was the Treasurer General at the time said decree of February 10, 1842, was published, and he had been instructed by the Secretary of State and of the Treasury Department to submit all doubtful questions to said Board of the Treasury for decision and he was one of the assisting witnesses at this sale and was doubtless a subordinate in the Treasurer General's office, perhaps chief clerk at this time, and by reason of his vast experience in such matters would doubtless have been consulted by Lopez, the granting officer, about the proper procedure in making the sale.

All that has heretofore been said in this brief in relation to the presumptions which must be indulged in favor of the validity of the acts of an officer and in favor of the contemporaneous interpretation placed thereon by him whose duty

it is to act under these laws applies with equal strength to this phase of the question.

Taking a practical view of the situation, it is apparent from the history of the sale of temporalities, as shown in the orders and decrees of the Supreme Government, which are hereinbefore cited, that the officers whose duty it was to sell the same did not proceed with alacrity to execute those orders. This may have been due to the influence of the clergy, who were in possession of the temporalities, or to other causes unknown to us. Hence when Santa Anna, owing to the embarrassed condition of the Treasury, made a demand that the Board of Sales in the different departments should proceed to sell the temporalities in said departments, it was the strongest evidence of his fidelity to the interests of the National Government, if the Governor of the Department caused the Treasurer General, in compliance with the spirit of said order of Santa Anna, to proceed himself to sell all temporalities the value of which did not exceed the sum of $500, and with the sale of which for that reason the Board of Sales in the several departments were not entrusted by the existing laws.

It cannot be doubted that the ample power given to the Governor and to the Board of the Treasury to procure the prosperity of the department and to increase its revenues and to promote the most easy and prompt collection of the revenues thereof fully authorized said Governor or said Board of the Treasury to require the Treasurer General to make such sales of temporalities in accordance with the spirit of said decree, if he did not already possess the power under existing laws.

The price which was obtained for said temporality by said sale was fair and adequate, and was fully equal to the minimum value which would have been placed upon said land if sold as vacant public lands. It has not been shown that any advantage could have accrued to the purchaser by reason of the manner in which the sale was made, and it is not rea-

sonable to suppose that Santa Anna had any fault to find with the fact that the sale was made by the Treasurer General of the Department instead of by the Board of Sales, if as a matter of fact said Treasurer General did have the power to make sales of vacant public lands under existing laws when the value of the same did not exceed the sum of $500.

The insistent language used by Santa Ana in said decree of February 10, 1842, shows that his sole object was to secure revenues for the Treasury Department. It cannot be doubted, therefore, that the action of the Treasurer General in making the sale was in accordance with the spirit, if not within the express letter, of said decree of February 10, 1842, even if we do not acknowledge the existence of the presumption that if an order was necessary to authorize him to make the sale, such order was made by Santa Anna and received by the Governor and communicated to the Treasurer General.

We have put in evidence a title paper or patent duly executed by the proper officer possessing the political power to issue the same, and the burden is upon the Government in this case to overcome the presumptions in favor of the validity of his acts. If the archives of Mexico do not contain any order or direction from the proper officer of the Supreme Government to the Governor or the Treasurer General of the Department of Sonora to make this sale and authorizing the Treasurer General to make it in the manner in which he did, the Government ought to show this fact affirmatively.

Said report of Special Agents Flipper and Tipton, at page 5 thereof, contains the following statement, to wit:

"We made inquiries as to correspondence between the State or Departmental authorities and the National authorities and were informed that if any such correspondence existed, which was doubtful, it would be found in the archives of the Secretary of State, but that those archives

were very voluminous, unarranged, and in the greatest disorder, and confusion, and we found that with the work we already had in hand and the unexpected delay to which we had been subjected it was impossible for us to examine them in the time at our disposal."

This grant, as claimed by us, contains a little less than 17 sitios, or a total of 73,246 acres. By the law of the State of Sonora of July 11, 1834, which was enforced at the date of this sale, in appraising the value of *vacant public lands* the price for each dry sitio was fixed at fifteen dollars, and for each sitio where water could be obtained in wells, and which had pasture, timber, etc., the price was fixed at forty dollars; and without these circumstances, at thirty-five dollars; and for each sitio that had a spring or river and was arid or broken, the price was fixed at sixty dollars; and for each sitio that contained *irrigable lands and is very fertile*, the price was fixed at eighty dollars.

If we concede that this grant contains two sitios which could be valued at eighty dollars each, and two sitios which could be valued at sixty dollars each, and one sitio which should be valued at forty dollars, and twelve sitios which should be valued at fifteen dollars each, we would have a total of seventeen sitios and a total valuation of five hundred dollars; but there are not quite seventeen sitios in the grant, and it does not contain any land which is "very fertile," and it contains at least fourteen sitios which are arid hills, containing very little pasture and being exceedingly dry.

Hence, I repeat, that if the land had been sold as vacant public lands, instead of as a temporality, its appraised value would not have exceeded the sum of five hundred dollars, and the Treasurer General of Sonora possessed the power to make such sale alone; and hence, if he did not possess the power to sell a temporality alone, the government was in no way injured by his mistake, as the sale was made at public auction, after due public notice, and therefore it ought

not to be disturbed at this late day, after the land has passed into the hands of *bona fide* purchasers for a valuable consideration.

The government of Mexico received and has retained the full value of the land as a consideration for the grant, and I cannot refrain from again pausing to ask, Will the highest Court of Equity in this land construe a law, under such circumstances, in opposition to the contemporaneous interpretation which was placed thereon by the officer whose duty it was to act under the same, and thus hold that a contract is void which does not come within the express letter of the law, although it falls within its spirit?

"Equity abhors a forfeiture," and it would be doing a great injustice to individuals for this court, after the lapse of more than half a century, to give those laws a more narrow and strict construction than that received from the Mexican authorities who were entrusted with their execution.

PRESUMPTION OF RATIFICATION BY SUPREME GOVERNMENT.

It is claimed by the Government that the grant should have been made by the Board of Sales, which was created under the law of July 20, 1831, and I have shown that the office of the presiding officer of that Board of Sales had been abolished, and that all his duties had been imposed upon the Treasurer General of the Department who made this grant; and I have further shown that the second member of that Board, to wit, the Senior Officer of the Treasury, had been merged in the same office of Treasurer General; so that said Board could not have consisted at the most of more than two members—said Treasurer General and the Attorney General; and we have seen that the law creating said Board provided that the Attorney General should be a member only where there was such an officer at the place of sale, and I have shown that there was no such officer at the place of sale at the time this grant was made.

It being the duty of the Governor to inspect the accounts of the Treasurer General, and to remove him from office for abuse of power, or to report such abuse to the Supreme Government, we must presume that the political power ratified and approved this sale, as we are bound to presume that the Governor performed his duty.

See *Gonzales vs. Ross*, cited *supra*.

See also *Clinton vs. Englebrecht*, 13 Wall., 434, where this court held that Congress must be presumed to sanction a law, because it was the duty of the Secretary of the Interior to transmit it to Congress, and the simple disapproval by Congress would have annulled it.

This court said:

"It is no unreasonable inference, therefore, that it was approved by that body."

Since the Executive Department alone in Mexico had authority to reform or annul titles, and since, as has just been seen, that department must be presumed to have had knowledge of this grant and notice of the manner in which the same was made, the presumption seems incontrovertible that the Treasurer General had power and authority to make the grant, or that his act in doing so was afterwards ratified by the Supreme Government.

BOARD OF SALES CREATED BY LAW OF JULY 20, 1831, NEVER PERFORMED A SINGLE OFFICIAL ACT AFTER CREATION OF NEW BOARD BY LAW OF APRIL 17, 1837.

But the absence of all evidence from the record on the part of the Government showing that said Board of Sales created under the act of July 20, 1831, ever existed or performed a single official act after the date of the adoption of the law of April 17, 1837, is almost conclusive evidence that it no longer existed.

One of the special agents of the Department of Justice, Henry O. Flipper, was the only witness on the part of the Government who testified against the location of the boundaries of this grant as claimed by the petitioners; that witness acknowledged that he claims a right to one hundred and sixty acres of the best land within this grant. He qualified as an expert witness in the case by claiming to have examined more than two thousand Spanish and Mexican land titles, to wit, all of the grants in nineteen counties of the State of Chihuahua, and to having had twelve years' experience in examining titles and surveying grants in the State of Sonora. He admitted upon cross-examination that in the year 1890 he had examined the title to this grant and had made a sworn statement to the effect that he was familiar with all the laws, usages, and customs of Mexico relating to grants of land, and that the title to this grant, was genuine, and that the grant could only be defeated by establishing the indefiniteness of the boundaries, although he admitted that *all or nearly all* the title papers which he had examined were *equally obscure, uncertain, and indefinite* in this respect. (Record, pp. 205 *et seq.*, 227.)

This witness assisted Mr. Reynolds in the preparation of the trial of this case and upon the trial, and doubtless in the preparation of the brief on the part of the Government which has been filed in this Court.

This witness, together with Mr. Tipton, another special agent of the Department of Justice, made an exhaustive examination of the archives of Mexico at Hermosillo *since the trial of this case* and since the Court of Private Land Claims declared this grant void for the reason that the Treasurer General had no power to make the grant, and that *it must necessarily have been made by either the Board of Sales which was created under the law of July* 20, 1831, or that created under the law of April 17, 1837.

Said Special Agent Flipper had full knowledge at the time he made said examination of those archives that it was

the contention of the Government attorneys that the sale of this grant must necessarily have been made by the Board of Sales created under the law of July 20, 1831, or that created under the law of April 17, 1837, and he was likewise possessed of full knowledge of the fact that the petitioners in this case insisted, upon the trial in the lower court, that *the Treasurer General was authorized to make said grant alone* because of the fact that it did not exceed the sum of five hundred dollars in value. Said special agent, Flipper, made the translation of the title papers of this grant which appears in the brief of the Government before this Court, and he therefore necessarily knew that the recitals in said title papers show that *said Treasurer General claimed to possess the authority to make said grant alone by reason of Article* 73 *of said law of April* 17, 1837.

In view of all these facts, why has it not appeared in evidence or in the report of said special agents, Flipper and Tipton, that said Board of Sales created under said law of July 20, 1831, ever performed a single official act of any kind or nature whatsoever after the passage of said law of April 17, 1837? If said board *did* continue to exist and was *not abolished* by virtue of said law of April 17, 1837, the records contained in said archives must necessarily furnish ample proof of that fact, and the interest which said special agent, Flipper, had in this case as one of the defendants and as claiming to own a valuable part of this grant, besides the active partisan zeal he displayed as a witness in the case, as this Court can readily see by an examination of his testimony as contained in the record, and his duty to the Government as its special agent would certainly have led him to have reported such evidence had he been able to discover it.

We assert on the part of this petitioner that no such evidence exists, and that no single act was ever performed by said Board of Sales which was created by said law of July

20, 1831, after said law of April 17, 1837, went into effect in said Department of Sonora.

Must we prove this negative in order to establish our rights? It would seem to us that we are sufficiently protected by the presumption in favor of the validity of the acts of an officer, and that it rests upon the Government to *affirmatively* show that the construction which it attempts to place upon these laws contrary to the interpretation of them which was adopted by the officers whose duty it was to execute them is supported by those facts which could so easily be established if they do exist.

In the case of *United States vs. Arredondo*, 6 Peters, 728, this Court said:

"The acts of public officers in disposing of public lands under color or claim of authority are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it and deny the power by which it is professed to be granted. Without the recognition of this principle there would be no safety in title papers and no security for the enjoyment of property under them."

In the case of *U. S. vs. Peralta*, 19 How., 347, this Court said:

"The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it."

In *Hancock vs. McKinley*, 7 Texas, 443, the Court said:

"The construction of their powers and of the laws which conferred them, adopted and acted upon by the authorities under the former government of the country, must be respected until it be shown that they have clearly transcended their powers or have acted manifestly in contravention of law."

And again, in the same case, the Supreme Court of Texas said:

"It would not be reasonable to suppose that the higher officials who acted in the execution of this grant did not have as enlightened views in respect to the true policy of the Government and as just an appreciation of their powers and duties as we possess in respect to them."

To the same effect are *De Lassus vs. U. S.*, 9 Pet., 134; *U. S. vs. Clark*, 8 Pet., 452; *Strother vs. Lucas*, 12 Pet., 438, and many other cases.

I have insisted that the orders of May 10, 1829, and July 7, 1831, directed the Commissary General to sell temporalities and were still in force, and that the Treasurer General, who had succeeded to all the powers formerly exercised by the Commissary General under said laws of April 17, 1837, and December 16, 1841, was therefore authorized to sell this temporality, provided its value did not exceed the sum of five hundred dollars, without regard to the decree of February 10, 1842, since said orders were in no way inconsistent with said decree of February 10, 1842.

The circular issued by the Minister of the Interior to the Supreme Government of Mexico on May 25, 1838, and approved by the President of the Republic, found in vol. III, Compiled Laws of Mexico, page 557, says:

"It must be noted that there are in force all such laws as are not absolutely inconsistent with the prevailing system, and unless they are found to be expressly repealed by any other subsequent disposition, this rule also holding good in regard to those laws which were enacted in the old epoch and under the different forms of government which the nation has had," etc.

I submit, therefore, that said orders of 1829 and 1831 were still in force at the time this grant was made, and fully authorized said Treasurer General to make this sale.

DECREE OF FEBRUARY 10, 1842, ANALYZED.

The decree of February 10, 1842, directs and demands that the Boards of Sale in the several Departments shall proceed to sell "the properties" situated therein that pertain to the Department of Temporalities. It does not say ALL the properties, but simply "the" properties. In view of the interpretation placed upon this order by the Treasurer General of the Department, it is fair to hold that the words "the properties" mean all those properties of that character which the existing laws gave said Board of Sales jurisdiction over, to wit, all those exceeding the sum of five hundred dollars in value.

Naturally Santa Anna directed his orders to that body which was already entrusted by law with the sale of the more valuable ones. But that the greater includes the less is axiomatic; and since the object and purpose of this order was to procure revenues, and since the language of the order itself demonstrates the urgent necessity for such revenues and the extreme anxiety of the chief executive of the Supreme Government to secure them, it follows as a fair construction that said decree of February 10, 1842, is ample authority to the Treasurer General to himself proceed to sell all those temporalities which do not exceed the sum of five hundred dollars in value, as was done in this case.

"Equity abhors a forfeiture" and "every presumption will be made in favor of the validity of a grant."

In the case of *Strother vs. Lucas*, 12 Pet., 410, this Court said:

"When the act of the officer is done contrary to the written order of the King, produced at the trial, without an explanation, it will be presumed that the power has not been exceeded, and that it was done by some order known to the King or his officers, though not known to the subject. It must be clearly proven that he has transcended his power before they so determine it."

It is true this Court has held that this presumption could not apply to the acts of an officer under a constitutional form of government like Mexico's; that it only applied in the case just quoted because the will of the King was the supreme law of the land. We do not ask the Court to apply it in its full strength to this case, nor is it necessary; but we do insist that the principle which underlies it amply justifies this Court in holding to the presumption for which we have already contended, that if any express order to the Treasurer General to make this sale was necessary it must be presumed to have been given by the Chief Executive of the Supreme Government to the Governor of the department, who was made by law the sole conduct of communication between the treasury office of the department and the executive office of the nation, and that said Governor in turn communicated said order to said Treasurer General.

History shows us that there was no constitutional government in Mexico, in the sense in which we understand that term, from the year 1835 to the year 1847, at any rate. It is true that a pretense to constitutional government was maintained; but we know that Santa Anna never hesitated to override the constitution or to set any of its provisions aside. His orders and decrees were as absolute and binding as the order or decree of a King of Spain was, at the time of said grant referred to in the case just above cited, in so far as he was able to enforce his said orders and decrees by the use of an army or through the governor of the department, who was his appointee and who doubtless received many secret instructions from him.

It is a matter of history that the revenues of the Supreme Government of Mexico were at that time in a deplorable condition, and it is also matter of history that in securing money to run the government and to sustain himself in power Santa Anna paid little or no regard to the constitution or the laws.

Under this condition of affairs, I repeat that this Court

would be fully justified in adopting, and, in my opinion, ought to adopt the presumption set forth in the case just cited as applicable to grants made during this period of time.

But there is another fact which raises a strong presumption in favor of the interpretation that was placed upon his power by the officer who made this grant. A law of March 5, 1845, provides that "the property of temporalities and all others whatsoever *that have not been sold*, that have been set aside for hospitals, charitable institutions, foundling asylums, and others establishments for benefices or public instruction, shall be returned immediately to the authorities or corporations that were administering them, or are to administer them, in conformity with the laws."

"Art. 2. The full value of the property alienated by the Government shall likewise be returned to them, and the interest or annual charges on the capitals which were recognized when the alienations were made shall be satisfied for them, and the new charges to be made on those capitals, in favor of the establishments mentioned in Article 1, shall not, for that reason, create the right of authorization."

The land conveyed by this grant was the mission of Tumacacori, Calabasas, and Guebabi. The affairs of this mission were administered by the clergy—probably by the order of Franciscans—as we shall presently show, and in the year 1841, when a survey was being made for the sale of the vacant land between the Casita ranch and the Tumacacori and Calabasas mission, which vacant land was sold under the name of the Nogales grant, a Catholic clergyman responded to the notice for the owners of adjacent tracts to appear and point out their boundaries as the agent for the owners of the Tumacacori and Calabasas mission. (See record in case of Ainsa *vs.* U. S., 161 U. S., 209, being case No. 429 of the October term, 1895.)

We also find that a clergyman appeared as the representative of the owners of said mission in the matter of a com-

promise of a dispute over the boundaries between said mission of Tumacacori and Calabasas and the Sonoyta land grant in the year 1823. (See Record, pages 279 and 280.)

May we not indulge the presumption, therefore, that if the granting officer exceeded his powers in making this sale of the grant here in question the order of Franciscans or the church authorities, whoever they might be, who had been in charge of the administration of this mission and whose representative appeared as late as the year 1841 would have taken some action under said law of 1845 to have this grant annulled, or at least would have made some effort to recover from the Supreme Government, under Article 2 of said law, the full value of the property which had been alienated by the government through the act of the Treasurer General?

It seems to me it is fair to presume that the church authorities demanded and received from the government the full value of their property which had been alienated by virtue of said sale, and hence it follows that the government must have had notice of the same and by its act in refunding the value of the property to the church authorities ratified and confirmed the act of the Treasurer General in making said sale.

THIS GRANT PROPERLY CLASSIFIED AND SOLD AS A TEMPORALITY.

It is contended on the part of the Government that the Treasurer General had no power to make the sale of the land contained in that grant for the reason that the lands in question were not *temporalities* within the meaning of said decree of February 10, 1842, or said orders of May 10, 1829, and July 20, 1831. In support of this contention the attorneys for the Government quote certain definitions of the word "temporalidades" as follows:

"Aggregation of proceeds or any other profane or worldly thing ecclesiastics receive from their benefices or prebendes."

Again:

"Proceeds, revenues, or any other profane thing ecclesiastics receive from their benefices or prebendes, and of which it is customary to deprive them when they contravene the laws," etc.

Counsel goes on to say that the order of Jesuits was suppressed by decree of the Cortez of August 17, 1820, which order was ratified by the decree of the Cortez of October 1, 1820, and that article 23 of said last decree provides that—

"All the movable and immovable property of the monasteries, convents, and colleges that are now suppressed or that may be suppressed hereafter * * * are placed to the public credit."

And, says the counsel for the Government, "these properties are the temporalities referred to in all subsequent laws on that subject."

Conceding that these definitions are correct, and that the statement of counsel for the Government is correct, I fail to see how it follows that the Mission of Tumacacori and Calabasas, which was the subject of this grant, was not a temporality.

Newman and Barreti's Spanish and English Dictionary gives as one of the definitions of the word "benefices" the following, to wit: "an endowment of land."

The decree of February 10, 1842, directs the sale of the "fincas" situated in each department that pertains to the department of temporalities. The word "fincas" signifies property—"not property in a general sense, but a particular class of property, usually real property, which has at one time been reduced to private ownership and capable of producing a revenue by its use or leasing."

See dissenting opinion of Justice Sluss, of the Court of Private Land Claims, in the case of San Rafael del Valle, being case No. 184, October term, 1896, now before this Court.

All *temporalities* were classified as national property under the law of August 4, 1824, and it is at least open to doubt whether the sale and control of all the vacant public lands within the borders of the several States were not vested in the States by said law. The State of Sonora so construed said law and assumed exclusive control of the vacant public lands within its borders as early as the year 1825, and retained all the revenues from the sales of such vacant lands to its own use, with the knowledge and acquiescence of the National Government, until the change in the constitutional form of the National Government in the year 1835.

This fact is fully demonstrated by said report of Special Agents Flipper and Tipton and by the correspondence between the State and National Governments which is contained therein, as well as by the certificate of José Maria Mendoza as Comisario of the Treasury of Arispe, in the State of Sonora and Sinaloa, the translation of which is set forth in full on pages 22 and 23 of Appellant's Reply Brief, by Mr. Rochester Ford, in the case of *Santiago Ainsa vs. U. S.*, No. 27, October term, 1897, of this Court, and the original of which appears in the archives of Sonora as an endorsement upon the expediente of the San José del Carrizo grant, which was issued in the year 1825.

Hence we see a clear reason for retaining mission properties as a distinct class of lands, falling under the term temporalities, and to be included in every national law relating to that class of property within the States of the Republic.

In the territories of the Republic it was not necessary to maintain any such distinction, perhaps, after the law of 1834 secularizing the missions, as the National Government was exercising dominion over all public lands, whether vacant or occupied, within the borders of the territories of of the Republic.

It may be urged that after the year 1835 no such distinction was necessary in any of the Departments of the Republic, and this is logically and literally true. The dis-

stinction had already existed, however, for at least ten years, and consequently a decree for the sale of temporalities within the Departments, which had formerly been States, would necessarily be construed as including all property which had ever been impressed with that character, and over which the National Government had retained control under the law of August 4, 1824, and of August 18, 1824, and even under the regulations of 1828, and this undoubtedly included all the missions within the Republic.

The missions contained churches, haciendas, and cultivated farms, which were occupied by the Indians and the church or monastic authorities, and the revenues from which were administered by the church or monastic authorities and were devoted to the support of the church or of the particular monastic order in charge of said mission.

In his History of Mexico, Bancroft tells us that whenever a mission became opulent under the administration of the Jesuits or Franciscans the church hierarchy took it away from the monastic order which was administering the same and placed it in the hands of the secular priests in order to secure its revenues.

The history of the missions of Sonora shows that they were mostly founded and established by the Jesuits. Bancroft's History of Mexico contains an elaborate account of these missions. It tells us that the monk in charge of each mission had supreme power over the persons and property of the Indians, including their lands; that the lands were alloted to the Indians in severalty by the Administrator of the Mission, and were taken away from them and given or loaned to other Indians for cultivation at the pleasure of the Administrator. The Indians were compelled to labor as directed, and the proceeds of their labor were taken charge of by the religious Administrator of the Mission.

THE GRANT OF 1807 WAS FOR THE DECENT SUPPORT OF THE CHURCH OF THE MISSION OF TUMACACORI AND CALABASAS.

The original titulo of 1807, which is now before this Court, provides that the natives of Tumacacori shall enjoy the use and freely possess the lands referred to in the expediente for their own benefit in community and individually, and "*for the decent support of the church of said mission.*" (See Record, page 277.)

The Standard Dictionary defines temporalities as "a revenue or possession of a religious house or an ecclesiastic."

The lands comprised within this grant, therefore, undoubtedly constituted "immovable property of a monastery," and produced revenues which were applied to the use, benefit, and support of the church, and therefore they must necessarily fall within the definitions which have been given, even by counsel for the Government, of the word temporality, or "temporalidades."

That the Mission of Tumacacori possessed a hacienda is evidenced by the testimony of Jesus Maria Elias, who testifies at page 61 of the Record that his "grandfather was administrator of the hacienda of Tumacacori on account of the Mission of Tumacacori" at the time his father and mother were married in the church, photographs of which, marked Exhibit "C" and "D," are found at page 284 of the Record.

We have seen that the Mission of Tumacacori and Calabasas was represented by Friar Ramon Liberos in the year 1823, at the time of the compromise with the owners of the Sonoita grant of the dispute over the boundaries between said grant and this mission.

And we have seen that the Mission of Tumacacori and Calabasas was again represented in the year 1841 by a clergyman when the owners of said mission were called upon to

defend and point out its boundaries upon the occasion of the location of the Nogales grant, which has heretofore been before this Court.

In the petition for additional lands which is set forth in the titulo of 1807, at page 275 of the Record, it is alleged that said additional lands and places belong to the Mission of Tumacacori "by legal, public, and judicial purchase from their primitive and legitimate owners, and that since the time of the Jesuits our said Mission of Tumacacori possessed the same as a fundo (farm), all of which is shown by the respective instruments of sale and transfer executed before the legitimate authority by those ancient owners."

Counsel for the Government, in their brief, have held one of our witnesses, Mr. Ygnacio Bonillas, up to scorn and ridicule because he dared to assume in surveying this grant that said additional lands could by any possibility have been included in the sale as belonging to the class of temporalities.

This objection seems too frivolous to require any answer, further than to point out the fact that if these lands were purchased by the Jesuit order, which was administering the Mission of Tumacacori at the time, with funds of said mission, and were thereafter devoted to the support of the church and maintenance of the mission, it is difficult to conceive why said additional lands did not thereby acquire the character of temporalities.

Counsel for the Government have failed to point out upon what theory they based their assumption that only such lands as were gratuitously granted to the church by the Government became temporalities. Upon this theory I fail to understand how churches, colleges, hospitals, and rural or urban properties owned by the churches were all necessarily included in the word temporalities as used in the different national laws on this subject.

I am curious to have counsel for the Government point out in what elements these additional lands failed to fit the

definition of temporalities given in their brief if the other lands of this mission were properly classified as a temporality.

Bancroft tells us in volume II, History of Mexico, page 430, that as early as the year 1766 the Jesuits were required to pay one per cent. of all the produce of their haciendas, ranchos, and sugar plantations as tithes, and that they strenuously resisted the payment of tithes. This resistance, among other things, is given as a reason for the decree of February 26, 1767, of King Carlos III expelling the Jesuits from his dominion in Europe, America, and Asia.

At page 442, vol. XI, Bancroft's History of Mexico, we are told that on the 18th of July, 1767, the Viceroy and Audencio issued an edict for the abolition of the temporalities of the Jesuits, and again warning the people to be obedient and submissive to the King's orders.

In vol. XV, at pages 575 and 576, Bancroft tells us that under this decree the Padres were removed from all the missions, and a commissioner took possession and held all the property, subject to the order of the Government. Bancroft further states that "of the acts and words and feelings on reception of the said unexpected order to give up their missions, their neophyte subjects, the results of all their toils, the homes where many of their number had grown old, we know absolutely nothing, since for some unknown reason the Jesuits themselves have kept silence, and it was the policy of the Government to observe the strictest secrecy."

At pages 548 to 560 of the same volume we find an interesting account of a rebellion in the immediate vicinity of this grant on the part of the Indians, who, we are told, were subject to the Jesuits in Sonora.

We have just seen that the Jesuits were required to pay tithes amounting to one per cent. on all the products of the lands contained in their mission. It will certainly not be contended that the law for the payment of these tithes contemplated that they should only pay one per cent. upon the crops which the monks raised by their own personal manual

labor. The amount on such crops would hardly have been sufficient to have caused them to rebel so seriously against the tax.

It is apparent that the Jesuits considered the missions to be their property, and that the Government treated them as such, for under said order of the 18th of July, 1767, for the sequestration of the "*temporalities*" of the Jesuits, the Government took possession of the *missions* in Sonora, *thus treating these missions as temporalities.*

LAW SECULARIZING THE MISSIONS.

On April 16, 1834, a national law was passed in Mexico secularizing all of the missions of the Republic.

The Standard Dictionary defines the word "secularize" as follows:

"One to convert from sacred to secular uses; transfer from ecclesiastical to temporal control; use (a sacred thing) for secular ends or benefits."

It is difficult for the writer to understand the necessity for secularizing the missions, unless prior to that date they had been considered to be temporalities. How can anything be secularized which is already secular?

In the case of *U. S. vs. Cruz Cervantes*, 18 How., 555, this Court states that the missionaries and Indians had an usufruct or occupancy of the land at the will of the Sovereign, and that the legal title to the missions always remained vested in the Sovereign, and that after said law of 1834 the public authorities in the Territory of California granted these lands to individuals in the same manner as other public lands.

This statement is repeated by this Court in the case of *U. S. vs. Ritchie*, 17 How., 525.

It must be borne in mind, however, that the manner of making grants of land in California was defined by regula-

tions which were made specially applicable to that Territory or department, and which did not extend to the Department of Sonora.

In the case of *U. S. vs. Workman*, 1 Wall., 749, we find a letter from Franco, the Bishop of the Californias, dated November 17, 1840, and addressed to the Supreme Government of Mexico, on the subject of the secularization of the missions in California under said law of 1834.

In this letter the learned Bishop refers to the missions as temporalities belonging to the missionaries, and complains bitterly of the fact that they have been put in the possession of administrators for the Government who are demoralizing the Indians by their vicious conduct.

It seems plain, therefore, that the mission properties were universally considered as being temporalities.

It seems to me, however, that the question as to whether this mission was a temporality or not, like the question of its abandonment by the Indians prior to its sale, may properly be considered a question of fact, which it was the duty of the granting officer to determine before making the sale.

Suppose, for instance, that the proper officers of the Land Office, in the regular course of their duty, decided in good faith that certain lands are subject to purchase as desert lands, and that it afterwards turns out that these same lands will grow crops without irrigation and were not therefore properly classified as desert lands, can the grant be avoided by this Government upon the ground that the lands in question were improperly classified by the granting officers after the purchaser has paid for the same in good faith and has duly received his patent therefor?

In the case of *U. S. vs. Aredondo*, 6 Peters, at pages 646 and 647, this Court said:

"It is objected that the lands in question are within the Indian boundary and not subject to be granted. Of the fact that such location there seems to be no doubt, as the center

of the grant is the Indian town of Alachua. The title of the Indians to these lands is not a matter before us. The grant is made subject to their rights, if they return to resume them, and their abandonment has been ascertained by a proceeding which the intendente in the grant calls a sentence pronounced by him in his official character on the report of the Attorney and Surveyor General. * * *

"The fact of abandonment was the important question to be ascertained; if voluntary, the dominion of the Crown over it was unimpaired in its plenitude; if by force, the Indians had the right, whenever they had the power or inclination, to return.

"This is a matter which we feel bound to consider a judicial one, and that we cannot look behind that final sentence of an authorized tribunal to examine into the evidence on which it is founded, but must take it as a *res adjudicata* by a foreign tribunal, judicially known and to be respected as such."

As the courts of Mexico have no jurisdiction to reform or annul titles, and as that power rested in the political officers of the Government solely, it seems to me that the decision of the Treasury General, that this land did constitute a temporality, is a conclusive adjudication of that fact, at least until his decision has been set aside by the proper superior officer of the Mexican government, unless it is the purpose of this Government to now attack it upon the ground of fraud; and, if so, the burden is upon this Government to establish the fraud by clear and satisfactory proof.

ALLEGED FRAUD ON THE PART OF THE GRANTING OFFICER.

Fraud must be proven by competent evidence, and mere surmise will not be sufficient at this late day to establish the falsity of recitals in a Mexican grant.

Counsel for the Government say at page 71 of their brief:

"It is clear from the recitals in the papers themselves that Lopez knew he had no authority to make the sale of the lands if they were public lands of the nation, and he

sought to avoid this very difficulty by arbitrarily classifying them as temporalities."

And at page 72 of said brief they say:

"With this law recited as authority (the law of February 10, 1842) it is at least questionable whether Lopez (the Treasurer General) may not be charged with bad faith in failing to have the Board of Sales perform its duty instead of assuming to himself all the powers and authorities in the matter."

In other words, counsel takes the position that the Treasurer General acted fraudulently in making this sale. The language used by counsel can mean nothing else. It is well settled that fraud must be established by clear proof. Counsel for the Government does not enlighten us by pointing out a single recital in the title papers tending to show that Lopez knew he had no authority to make the sale of the lands if they were public lands of the nation, nor tending to show that he arbitrarily classified these lands as temporalities.

The recital in the title papers of the very authority upon which he makes this grant, to wit, Article 73 of the law of April 17, 1837, demonstrates that the Treasurer General *did* believe that he had power to make this grant of land, even if the lands were *vacant public* lands of the nation.

It cannot be doubted but that Lopez rested his authority to sell without the aid of the Board of Sales upon said Article 73 of the law of 1837, and in view of that fact it would have been absurd for him to arbitrarily classify these lands as temporalities and to recite said law of February 10, 1842, as authority for his power to make the sale when he clearly had the power to sell them alone if they were vacant public lands of the nation.

Fraud is never committed by an official who must be held responsible for his acts without some motive or reason. What motive could Lopez have had in arbitrarily classify-

ing these lands as *temporalities* in order to make this sale *alone?* It would have been just as easy for Aguilar to have filed a petition for the sale of the lands as vacant public lands of the nation, and in appointing the surveyors to survey and appraise the lands it would have been just as easy for Lopez to have selected persons who would appraise them at the sum of five hundred dollars or less. As a matter of fact, an examination of the appraisements of other grants of land which had been made in that section of the country will demonstrate the fact that it is much more than probable that an appraisement of these lands as vacant public lands in the mode ordinarily pursued, would have resulted in the grant being appraised at much less than five hundred dollars.

By classifying the lands as temporalities the Treasurer General did not avoid the thirty days' public notice of sale which was required to be given in the vicinity of the land, as is evidenced by the recitals in the title papers of 1844 and the titulo of 1844 itself. Neither did he avoid the three public auctions at which competitive bidders could appear.

It was necessary for the sale to be just as public and notorious when made by the Treasurer General *alone* as when made by the Board of Sales. The fact that but one bidder appeared at the sale cannot raise suspicion of fraud, in view of the numberless expedientes which disclose the fact that it was very seldom any purchaser ever bid at a sale in competition with the original applicant for the land, and there is no reason to suppose that competition would be particularly lively at this sale. The lands were situated in a most exposed portion of the country, where the Apache Indians made life and property unsafe, and few men would care to risk their money in stocking or occupying them.

Then, again, Urrea, who was the Governor of the Department of Sonora at the time this grant was made, was the bitter political enemy and successful rival of Gandara, whom he had driven from office. The Governor of the Depart-

ment at that time appointed the Treasurer General. Gandara did not even dare to purchase this property in his own name, but had his brother-in-law, Aguilar, buy it for him. While occupying the office of Governor, it is fair to presume, said Gandara became thoroughly posted on the laws relating to grants of land.

The appraised value of the land was a fair and adequate consideration for it at that time. What possible benefit could Gandara have derived, therefore, by having the sale made contrary to law, even if it was possible for him to influence the Treasurer General, who had been appointed by his enemy, and who was subject to removal by the appointing power at any moment?

Counsel for the Government must be entertaining the idea in their own minds that this land was as diligently sought after and as much desired in 1844 by citizens of Mexico generally as it is now by the squatters who have taken forcible possession of the best of it, and who are clamoring through said counsel to have this Government forfeit our title for their benefit. (Record, pp. 176–'7; 100.)

Gold had not yet been discovered in California, the war with the United States had not yet taken place, and the wildest Mexican imagination did not at that time conceive it possible that these lands would ever be made valuable by becoming a part of the United States. Why, then, should Gandara risk upon a fraudulent title, or one made contrary to law, the thousands of dollars which he must have anticipated expending in improving and maintaining possession of these lands when it was just as easy for him to have secured the lands in a legal and lawful manner at the same or a less price?

Can any reasonable man suppose that Gandara afterward made the vast expenditures which he did upon those lands to settle, cultivate, and improve them knowing that he possessed a title which would not stand the test of the laws of Mexico? When Gandara took possession of these lands, in

1851, or even in 1852, he certainly had no idea that they would ever become a part of the United States, and he must have believed that he would have the government of Mexico to deal with in regard to his title.

We see from the report of Messrs. Flipper and Tipton on page 78 that Gandara was Governor of Sonora again in the year 1848, and that Lopez was then again the Treasurer General of Sonora. How easy it would have been for Gandara and Lopez together to have arranged for a resale of these lands if they had previously acted fraudulently or in collusion, or if either one of them had any reason to doubt the validity of the title which had already been issued to Aguilar.

GANDARA FURNISHED THE MONEY FOR AGUILAR TO PURCHASE THE GRANT AS TRUSTEE.

That Gandara furnished the money to Aguilar with which to purchase the grant is admitted by the Government at page 185 *of the Record.*

The attorneys for the Government seemed to have forgotten this fact, as at pages 23, 24, and 25 of their brief they seize an early opportunity to attempt to throw suspicion upon the *bona fides* of this grant by inserting an *ex parte* affidavit of one M. Escalante, which was made before a notary public, at the town of Nogales, Arizona, on July 8, 1889.

The writer objected to the admission of this affidavit in evidence, and the Court of Private Land Claims sustained the objection.

I must frankly acknowledge that the objection was made upon the general principle that it is usually safe to keep everything out of the Record which is not clearly competent. The statements contained in this affidavit would have been ruled out as mere hearsay had Mr. Escalante attempted to

repeat them under oath as a witness before the Court of Private Land Claims.

Upon examining the affidavit with more care since the date of the trial, I find that it contains certain peculiar earmarks which stamp it as the ingenious production of Special Agent Henry O. Flipper, who testifies, at page 231 of the Record, that he knew M. Escalante and was present at the time of his death, in Guaymas.

Mr. Flipper attempted to file upon 160 acres of land within this grant about the 1st day of March, 1889. He has claimed to own that 160 acres of land within this grant from that day to the present time. (See Record, pages 220 and 221.)

The affidavit of M. Escalante was made on July 8, 1889, only four months later, at the town of Nogales, Arizona, where Special Agent Flipper was residing at the time.

It was only a few months later that Mr. Flipper made a report to a Washington attorney upon this grant, in which he stated, under oath, that he believed the grant to be genuine, and that it could only be defeated by establishing the indefiniteness of its boundaries. This report was made on behalf of the other squatters upon the grant, and as Mr. Flipper testifies that he received no compensation for his work, it is apparent that he was taking a lively interest in securing evidence to defeat the grant. (See Record, page 206.)

The form of the expressions used in the affidavit of M. Escalante shows plainly that Escalante made his original statement in the Spanish language, and that it was translated into English by some other person. Who is more likely to have been this person than said special agent, Flipper?

The affidavit was made more than eight years after the Surveyor General of Arizona had recommended the grant for confirmation, and it was made after both Aguilar and

Gandara were dead. The record shows that Gandara died in 1879, and that Aguilar died in 1886.

The law authorizing the Surveyor General to take the testimony of witnesses in regard to the validity of grants expressly authorizes him to personally examine such witnesses. The affidavit of Escalante was not even sworn to before the Surveyor General, but was taken before a notary public at the home of said Flipper.

The only vital statement contained in that affidavit is the following, to wit:

"That the aforesaid Francisco Alejandro Aguilar told him that Manuel Maria Gandara, herein above mentioned, had put his name in the alleged deed of the 19th of April, 1844, transferring the said Tumacacori and Calabasas private land claim from the Federal Government to himself, the said Francisco Alejandro Aguilar, and likewise in the same manner to the alleged deed of the 2d of March, 1869, transferring the said Tumacacori and Calabasas private land claim from said Francisco Alejandro Aguilar to the said Manuel Maria Gandara, and that he, Francisco Alejandro Aguilar, had never owned said lands, but simply acted as requested."

This quotation bears internal evidence of the fact that it is the production of an expert in the art of stating what is false under the garb of truth, or, to put it differently, in the art of stating the truth so that it may be tortured into a construction which is as far from the real truth as the heavens are from the earth.

It is plain that M. Escalante did not state literally that said Gandara had himself written the name of said Aguilar in the titulo of this grant, the original of which is now before this Court, and an inspection of which will demonstrate the falsity of the statement if that was the intention of the affiant; neither did said M. Escalante intend to state that said Gandara had personally written the name of said Aguilar in said deed of 1869; and if he did so intend to

state, the falsity of the assertion is apparent upon an inspection of said original deed, which is on record in this case in the Court of Private Land Claims.

Said special agent, Flipper, qualified in the Court of Private Land Claims as an expert on the handwriting of the different officials who made grants of land in the State and the Department of Sonora, including the handwriting of the clerks in said department who wrote said titulo of 1844 which is now before this Court and including the handwriting of Lopez, the Treasurer General, who executed that title paper.

Special Agent Will M. Tipton has also qualified before said court as such expert, and both Special Agent Flipper and Special Agent Tipton were present assisting the able Attorney for the Government, Mr. Reynolds, upon the trial of this case. The titulo of 1844 was submitted to the careful inspection of all those gentlemen before it was offered in evidence, and it had been on file in the office of the Surveyor General of Arizona from the year 1864 until the date of the trial of this case in said Court of Private Land Claims; and yet the authenticity and genuineness of that instrument have never been questioned, and when said titulo of 1844 was offered in evidence by the appellant upon the trial of this case it was admitted by the Court of Private Land Claims without any objection upon the part of the Government. (Record, p. 54.)

It is plain, therefore, that Escalante merely intended to make affidavit to the fact that said Aguilar had told him that said Manuel Maria Gandara had furnished the money for the purchase of said Tumacacori and Calabasas land grant, and that he, said Aguilar, had taken the legal title in his name in said titulo of 1844, as trustee for said Gandara, and that said Aguilar never claimed to own any interest in said lands or to hold them otherwise than as trustee for said Gandara.

Hence the affidavit of said Escalante simply corroborates

the evidence which we expected to furnish by one of the sons of Gandara upon the trial of this cause, and which the Government saved us the expense of furnishing by admitting the truth of the fact, as appears upon page 185 of the Record.

The other statements contained in said affidavit simply show that the sale of the grant in 1844 by the Federal Government of Mexico to said Aguilar was a common and well-known fact; and it was equally as well known, as shown by the testimony of the 15 witnesses who testified to the possession of the grant by Gandara as early as the year 1851, that said Gandara was the real owner of the grant, and that said Aguilar merely held the same as a trustee for him.

Said deed of 1869 from said Aguilar to said Gandara itself contains internal evidence of this fact, for it expressly states that no money passed between said Gandara and said Aguilar at the time of the execution of said deed. It contains the following recital:

"And since the delivery of the money does not appear, he (the grantor) renounces the law 9, title 1, partita 5." (See Record, p. 286.)

Before that, in the same deed, the following appears, to wit:

"The said sum being paid and satisfied, he (the grantor) executes in favor of Don Miguel Gandara in representation of his father, Don Manuel Maria Gandara, the receipt."

The grantor also declares that "the said amount of four hundred and ninety-nine dollars is the just and true value of said lands, the ownership and dominion over which he deeds," etc.

It will be particularly noticed that the value of the lands in 1869 is placed in this deed at the same figures at which it was sold to Aguilar in 1844, less $1.00, one dollar. This dollar was doubtless omitted because of some additional tax

upon the execution of such deeds in Mexico, which would have been opposed had the sum reached the sum of five hundred dollars; but it is apparent that the valuation of four hundred and ninety-nine dollars was based upon the fact that the consideration for the land actually passed from said Gandara to said Aguilar at the date of its purchase from the Government of Mexico in the year 1844.

If Lopez, the granting officer, thought it necessary to arbitrarily classify the lands as temporalities in order to enable him to make the sale, why did he not make the proper Toma de Razon entry, upon which so much stress is laid by counsel for the Government, as well as by two members of the Court of Private Land Claims?

If Lopez was enacting a fraud for the benefit of Gandara at the time he made this grant, he certainly would not have omitted to make this entry unless it is conceded that it was not considered essential to the validity of the grant in Mexico.

To answer that Lopez omitted this entry so that his superior officers would have no knowledge that the grant was made is still more absurd, for the reason that if the execution of the grant was to be kept a secret there was no necessity for Lopez to arbitrarily classify the land as a temporality in order to make the sale alone, as we have already seen that he had ample power to make a sale of public lands alone.

But even if Lopez had not possessed power to make a sale of vacant public lands alone, at the time of this grant, it was unnecessary for him to arbitrarily classify the lands as a temporality if he was acting fraudulently, for the reason that if he had made the recital of the sale in the title papers, in accordance with the form usually pursued in the title papers in other grants, he need not have recited whether the sale was actually made by himself alone or by a Board of Sales.

In the Sonoita grant, the expediente of which will be

found in the record of case 181, October term, 1896, of this Court, the sale was made by a board of sales. The minutes of the sale are set forth in detail in the expediente, and the minutes of the last auction, as well as of each of the other auctions, are signed by the President and other members of said Board of Sales.

The titulo of said grant nowhere shows, either inferentially or otherwise, that the lands comprised in said grant were sold by a board of auctions or by any officer other than the one who executed the title paper, to wit, the Commissary General.

The recital in the titulo is as follows, to wit:

"And this Commissario General being satisfied with the foregoing petition, the three public auctions were made which took place on the 8th, 9th, and 10th days of November, 1821, the one sitio and three-fourths of another being solemnly auctioned off in favor of the denouncer, Don Leon Herreros, immediately notice of the transfer being added to the original expediente," etc.

We find exactly similar recitals in the expediente and titulo respectively of the San Rafael de la Zanja, except that the words differ slightly in the titulo of said grant, without, however, in any way indicating that the sale was made by any other officer than the Commissary General. The title papers of this grant are on file with the clerk of the Court of Private Land Claims, and have doubtless been examined by the attorneys for the Government.

This seems to have been the usual form of reciting in the titulo the facts in relation to the sale, and it cannot be doubted but that this Court would hold that upon such a recital the presumption immediately arises that the auction sale was made by the proper Board of Sales, if the law required the sale to be made by such a body.

Had Lopez made a similar recital in the titulo of this grant, he would have saved this appellant much trouble and expense, not to mention the fact that this Court would not

have had the labor imposed upon it of reading this long and probably tiresome brief.

In the face of these facts, the surmise on the part of counsel for the Government that Lopez acted fraudulently in arbitrarily classifying these lands as a temporality seems to be utterly without foundation. Had Lopez adopted the form of recital which is contained in said Sonoita titulo, he would not have recited a falsehood, even if he made the grant alone.

It must be apparent, therefore, that the recitals contained in this grant are the very highest evidence of the good faith with which the same was made by the granting officer.

If fraud had entered into the purchase of this land, Gandara would certainly have avoided any question as to the power of the officer who purported to make the grant, and he would certainly have provided and was in a position to provide the simple Toma de Razon entry, which this Court has already held is a sufficient short record of the grant, and which two members of the Court of Private Land Claims insist is the *only* record of the grant which can be recognized under the Gadsden treaty.

The ease with which such an entry would be inserted in either of the books of Toma de Razon which were found in the archives of Hermosillo is clearly demonstrated by an additional report of Special Agents Flipper and Tipton to the Department of Justice. That report shows a number of entries in the larger book of Toma de Razon at Hermosillo which are not in their proper places.

For instance, in the year 1848, at the very time that Gandara was again Governor of Sonora and that Lopez was Treasurer General, there is an entry in the book of Toma de Razon of a grant called Duraznoy Guamichil, which is dated July 25, 1846, and which follows a regular entry dated July 7, 1848. Other similar errors appear in said book. The grant just mentioned does not lie anywhere near the boundaries of the United States, and if fraud was perpetrated

in making that entry it was certainly not for the purpose of establishing title here.

That fraud was not the purpose of the entry is evident, however, from the fact that no attention is paid in Mexico to the question whether a grant is entered in the Toma de Razon or not, in determining its validity.

RÉSUMÉ.

Three members of the Court of Private Land Claims held that this grant was void for the reason that the power to make sales of land was vested only in the Board of Sales created under the law of July 20, 1831, and in the Board of Sales created under the law of April 17, 1837.

I have shown that when the States of the Republic of Mexico were abolished and an entirely new system of government was established under the constitution of 1835, which was known as the Departmental system, all the State and National offices ceased to exist, except those which were expressly retained temporarily and until new ones should be established by law and the functions of the same defined by law.

The law of April 17, 1837, provided a new and complete system for the collection of the revenues and for the conduct of the Treasury Department generally. It abolished the office of Commissary General and imposed the powers and duties of that office, together with many new and important duties and powers, upon the office of Superior Chief of the Treasury.

This law of 1837 required a Board of Sales consisting of certain specified officials, to the number of five, to make all sales and purchases on account of the Treasury Department when the amount of the sale or purchase exceed the sum of five hundred dollars.

The Board of Sales created under the law of July 20, 1831, was composed of the Commissary General, the Senior Officer

of the Treasury, and the Attorney General, where there was one.

Under said law of 1837, the Superior Chief of the Treasury was made the Senior Officer of the Treasury, and hence the duties and powers of two out of the three members of said Board of July 20, 1831, were combined in this one official, and this sale was made at Guaymas, in said State of Sonora, and there is no evidence that there was any Attorney General at that place at the time, and we must presume that the officer who made the sale performed his duty, and hence that there was no Attorney General at that place, if it appears that he took no part in the sale and if the law required him to do so. Hence if the Board of Sales, created under the law of July 20, 1831, was in existence at the date of this sale, the Treasurer General, nevertheless, had the right to make this sale alone, for the Superior Chief of the Treasury had been abolished by the law of December 16, 1841, and the duties and functions of that office were imposed upon the Treasurer General of the Department, and he is the officer who executed this grant and made the sale of the lands comprised in it.

The title papers of this grant, however, show that the granting officer interpreted said law of 1837 as vesting in him the power to make all sales and purchases on the part of the Treasury Department when the value of the same did not exceed the sum of five hundred dollars.

We have seen that no single act was ever performed by the Board of Sales created under said law of July 20, 1831, after the passage of this law of April 17, 1837, and hence it follows that either the chief officer of the Treasury had power to make such sales and purchases alone or else such power was not vested in any officer or Board, and we reached the absurd conclusion that no sale or purchase could be made on account of the Treasury Department unless it exceeded in value the sum of five hundred dollars.

It is conceded on the part of the Government that the

granting officer who executed the title paper, or patent, by which he sold these lands possessed the power and was the proper political officer to execute the titulo or patent, but it is urged that he misinterpreted the laws under which he assumed to act in determining the manner in which he should make the sale.

In answer to this contention, we submit that the following authorities, in addition to those already cited, are conclusive, to wit:

In *Mott vs. Reys*, 45 Cal., 379, the Supreme Court said:

"The general rule is, that when the acts of the officers of a foreign government are brought in question in our courts, the acts performed by them will be presumed to have been within the scope of their lawful authority, unless the contrary appears."

In the case of *Arguella vs. U. S.*, 18 How., 539, this Court said:

"The construction, therefore, which the Mexican officials put on the laws and their authority in making this grant raises a strong, if not conclusive, presumption that they were authorized to act as they did."

As the Supreme Court of Texas said:

"This court has repeatedly announced the doctrine that they will defer to the political and judicial authorities of other governments in the administration and interpretation of their own laws, and the court will respect the acts of the former authorities, as they must have known more about their laws than we do."

Halloman vs. Peebles, 1 Tex., 673.
Hancock vs. McKinley, 7 Tex., 384.
Edwards vs. James, 7 Tex., 382.
Cavazos vs. Trevino, 35 Tex., 133–157.

POINT II.

Was the grant located and duly recorded in the archives of Mexico prior to the Gadsden treaty?

Article 6 of the Gadsden treaty provides as follows:

"No grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day (25th of September) when the minister and subscriber to this treaty on the part of the United States proposed to the government of Mexico to determine the question of boundary, will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico."

It will be noticed that this article does not provide that grants made prior to the 25th day of September, 1853, will not be considered valid or be recognized by the United States, but simply that they will not be respected or be considered as obligatory if they have not been located and duly recorded in the archives of Mexico. In other words, the United States refuses to bind itself by the treaty to recognize such grants as obligatory and reserves to itself the right to recognize them or not, as it may deem just and proper.

In passing upon the validity of a title to a complete and perfect grant, it seems to the writer that this Court is not required to give any more consideration to Article 6 of the Gadsden treaty, just quoted, than it is to the laws, usages, and customs of the Mexican Government in determining the validity of its own titles, and to the well-recognized principles of equity and presumptions in favor of the grantee, who holds a formal title deed from the sovereign power; and therefore this Court is not bound to reject a grant in the absence of positive and express affirmative proof that the same had been duly recorded in the archives of Mexico prior to the said 25th day of September, 1853.

This Court did not hesitate to so hold in the case of *United States vs. Chaves*, 159 U. S., 452, as in that case this Court confirmed the title of Chaves to the land claimed by him, although the claimant based his right to the property upon possession alone, without the production of even the title papers, which were delivered to the grantee by the Mexican Government as evidence of his title and upon parol testimony that the same once existed, but had been lost.

In that case there was no evidence whatsoever by so much as a single witness that the expediente or any other record evidence existed. No witness testifies to having ever seen the same, and the only testimony produced on this subject was to the effect that the records purporting to contain the registry of said grants made by the Spanish and Mexican governments prior to the time the Government of the United States took charge were in a disconnected and fragmentary form, and that one of the most important books, containing the records of grants made by the Spanish and Mexican governments, was missing and was supposed to have been stolen.

In that case the counsel for the Government contended that the Court of Private Land Claims and this Court have no power to presume a grant upon proof of long-continued possession only; that their power is confined to confirming grants regularly and lawfully derived from Spain and Mexico; and it was doubtless argued by counsel, as has heretofore been done in Arizona cases before the Court of Private Land Claims, that proof of the existence of record evidence in the archives of Mexico is, under the prior decision of this Court, absolutely essential to the establishment of a valid title to a grant.

As there was no evidence in that case which tended to raise a suspicion of fraud on the part of the claimant, this Court evidently concluded that there was no field for the operation of the rule adopted by this Court requiring record

evidence of some kind in order to save the Government from spoliation of its territory by fraud, and the Court therefore proceeded to determine the case upon the well-established principles of equity and the law of nations.

The Mexican Minister at Washington, in a note addressed to the Secretary of the Interior of the United States on July 3, 1888, pursuant to instructions from the Secretary of State of Mexico, explained the understanding of the Mexican Government of that clause of the Gadsden treaty requiring record evidence in the following language:

"It seems to me clear that the said stipulation has for its object the prevention of approval of fraudulent concessions established by speculators, with the intention of acquiring lands that were never ceded to them by either the Spanish or Mexican governments; but here the facts are that the family Garcia, to whom the concession (grant) was made, has been in legitimate possession of the land, and the concession was made according to the laws in force, and if they cannot furnish the official proof of these facts, this circumstance is due to the fact that the archives of the State of Chihuahua were destroyed by the invading American army during the war of 1846 and 1847, and therefore it would appear that the interpretation given to the treaty by the Surveyor General Julian cannot be sustained."

And further on he says:

"When the United States acquired a considerable part of Mexican territory, first by the treaty of February 2, 1848, and afterwards by the treaty of December 30, 1853, both governments agreed in their desire to protect the inhabitants in their rights acquired to the lands which changed national ownership and agreed to respect inviolably the concessions (grants) of lands made by Spanish and Mexican governments previous to the dates of both treaties, and in Article 8 of the first treaty and in Article 5 of the second treaty their right of ownership to all their possessions was acknowledged (recognized, sustained) and also their right to dispose thereof as they should see fit."

"But the object of this stipulation was merely to put an end to the abuses that had been committed by virtue of the

first treaty in the presentation of fraudulent grants, and it was never the intention to deprive the legitimate owner of a piece of land or his rights thereto merely because he was unable to furnish legal proof of the grant or its record by exhibiting his title in any case where the archives had been destroyed by the invading United States Army."

RECORD OF THIS GRANT IS ESTABLISHED BY WRITTEN DOCUMENTS OFFICIALLY CONNECTED WITH IT AND FORMING PART OF ARCHIVES OF MEXICO.

The record of this grant in the archives of Mexico was established before the Court of Private Land Claims by the production of four original official documents, photographic copies of which are found between pages 238 and 239 of the Record, and translations of which are found upon pages 240 and 241 of the Record, as well as by the production of certified copies of five other documents which form a part of said archives, the translations of which appear upon pages 235, 236, 237, and 238 of the Record.

The authenticity and genuineness of all these documents were established by overwhelming evidence and were not disputed by the Government upon the trial of this case.

Mr. B. Rochin, the official keeper of the archives of Sonora, was brought to Arizona and placed upon the stand of the witness before the Court of Private Land Claims with the four original documents upon which we rely to establish the fact that the expediente of this grant existed in the archives of Sonora on the 25th day of September, 1853, the date specified in the Gadsden treaty. (Record, pp. 24–42.)

The members of the Court of Private Land Claims, the counsel for the Government, Hon. Mat G. Reynolds, the counsel for the squatters who are defendants, the two special agents for the Department of Justice, Messrs. Will M. Tipton and Henry O. Flipper, each and all inspected and examined these four original documents, and no single person intimated the slightest doubt, upon the trial of this

case, but that said documents are genuine and authentic, and were made upon the dates they purport to have been made.

Eufemio Tapia, whose name appears upon the first photographic document as the party who signed the same, was produced as a witness and testified that these documents were executed at the time they purport to have been executed, to wit, February 8, 1857, and February 10, 1857, and that the original expedientes of the Tumacacori and Calabasas land grant were at that time delivered to him by the Treasurer General of the Department of Sonora or State of Sonora, being then produced from the official archives of said Treasury Department. (Record, pp. 42–47.)

Appellant further proves that all the other parties who had any official connection with said documents died before the trial of this case. (Record, p. 185.)

In order to save the court some labor, I shall discuss the evidence relating to this record at greater length after I have first discussed the law which I consider applicable to the question of the sufficiency of this evidence to establish the fact that this grant was "duly recorded" in the archives of Mexico within the meaning of said Gadsden treaty.

INFERIOR EVIDENCE IS SUFFICIENT TO ESTABLISH A RECORD IF OFFICIALLY CONNECTED WITH IT.

In the case of *Weatherhead's Lessees vs. Baskerville et al.*, 11 How., 360, this Court said:

"The inferior evidence to establish the existence of a judicial record must be something officially connected with it, such as the journals of the court or some other entry, though short of the judgment of record, which shows that it has been officially made."

If such evidence is sufficient to establish the existence of a "judicial record," it seems to the writer that it is without

doubt competent and sufficient to establish such a record as we shall presently see was kept by the officials having charge of the sales of land in Sonora during the time that country was a scene of almost continual revolutions and frequent changes of government.

Under the principle here enunciated, it is plain that a Toma de Razon entry, the importance of which I shall hereafter discuss, would be sufficient in the absence of the expediente from the archives, coupled with slight proof of the destruction of the records generally.

I insist, however, that under the Gadsden treaty it was the intention of the high contracting parties that the existence of the expediente in the archives of Mexico at the date fixed in said treaty was the record intended to be required by the words "duly recorded."

There never was any express law, national, State, or, departmental, prior to December, 1846, requiring a Toma de Razon entry of a grant to be made, and that law was not retroactive, and therefore has no application to this grant which was executed in April, 1844; and I shall presently attempt to demonstrate that the Toma de Razon entry was made upon the expediente itself more than half the time, and that the practice of making such an entry in a separate book was not followed in more than one-half the grants made in Sonora from the time of its earliest settlement down to the date of the Gadsden treaty, and that the practice never was uniformly followed during any considerable period of time, and that therefore the practice of making a Toma de Razon entry in a separate book never was a usage or custom having the force of law.

INTENT OF CONTRACTING PARTIES BY INSERTING WORDS "DULY RECORDED" IN GADSDEN TREATY.

Blackstone tells us that in construing a law we should first examine the old law, then the mischief, and next the remedy. We know that article six of the Gadsden Treaty was intended as a *remedy*. We also know that the *mischief* which it was intended to remedy is fairly and correctly stated in the letter of the Mexican Minister at Washington, which has just been quoted.

The discovery of gold in California followed close upon the heels of this Government's acquisition of that immensely rich territory, and the phenomenally rapid increase in the value of property which but a few years before had been liberally granted by the Mexican Government in square leagues and not acres aroused the cupidity of unscrupulous land-grabbers, and in Pio Pico, who was Governor of California at the time the war broke out, these designing rascals found a willing tool to aid them in their efforts to steal property which had so suddenly become of immense value. It was proven to this Court by unimpeachable evidence, in numerous instances, that said Pico had fraudulently issued grants to different individuals after the war with Mexico had commenced and after the United States had secured possession of a large part of that territory, and that Pio Pico had antedated those grants to the end that they might be held valid under the treaty that terminated said war.

Antedated title papers were issued by Pio Pico in due form of law, and if they were to be adopted as *prima facie* evidence of title by this Government when produced from the pocket of the grantee or by his assignee, who in many cases was a *bona fide* purchaser for value, it would have been practically impossible for this Government to protect its property from gross fraud, because it was an easy matter to establish the fact that many of the records of the Mexican

Government relating to land titles had been lost or destroyed, and it thus became almost an impossibility for this Government to furnish conclusive evidence that the title papers in question had been antedated.

Necessity, therefore, compelled this Court to depart from the well-recognized principles of law which it has uniformly applied in passing upon the question of the validity of a title to land in the United States when the grantee holds a patent from this Government to his lands.

The laws of the United States require that a patent to land be recorded at length in certain books which are kept in the archives of this Government at Washington, and in that manner our Government preserves a record which gives the complete description of the land granted, and yet this Court held in the case of *U. S. vs. Marshall Mining Company*, 127 U. S., 569, that the recording of the patent is not essential to the validity of the title of the grantee.

In the case of *U. S. vs. Stone*, 2 Wal., 525, this Court said:

> *"The patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patent or title until it is set aside by some judicial tribunal."*

It cannot be doubted that had this grant remained within the jurisdiction of Mexico this claimant could have made out a *prima facie* case by simply producing his titulo and proving the authenticity of the signature of the granting officer. The absence of any trace of record evidence in the archives of Mexico would have in no way affected his title, and the burden would rest upon the Mexican Government to establish fraud by clear, convincing, and unequivocal proof in order to avoid the grant.

Under the treaty of Guadalupe Hidalgo, it seems to the writer, this Court would have adopted that principle in passing upon the validity of titles to grants in California, just as it did in the early cases under the Louisiana and Florida treaties. But in order to counteract the gross frauds

which had been attempted in California, the direct proof of which had been brought to the attention of this Court, it was necessarily compelled to refuse to indulge this presumption, and to require some evidence that at least a portion of the record of a grant which was required to be made by the Mexican officials existed or had existed in the archives, or, in the absence of any trace of such record evidence, that the grantee had been in possession of the land for a sufficient length of time prior to the treaty to avoid any suspicion of the *bona fides* of his claim.

As was said by this Court in the case of *U. S. vs. Neileigh*, 1 Black, 306:

"The propositions laid down in the Castro case and others preceding it were an absolute necessity to save the Government from utter spoliation of its territory. * * * The numerous frauds which had been attempted to be perpetrated, depending upon this theory of the destruction of the records, have compelled us to reject it altogether as fabulous."

In the case of *De Aro's Heirs*, 22 How., 293, a grant was confirmed without any record evidence and upon the titulo alone and proof of its genuineness, accompanied with 16 years' possession of the land.

A careful examination of all the land-grant cases from California, however, will disclose the fact that when the authenticity and genuineness of the title papers were not disputed by this Government and when the grantee was in possession of the land prior to the acquisition of the territory by this Government for a sufficient length of time to repel the suspicion of fraud, that rule of necessity in regard to record evidence was never enforced.

The writer has not been able to find a single case in which that rule of record evidence was enforced by this Court when the facts of the case did not justify a strong suspicion that the title was conceived and executed in fraud; and the Court uniformly called attention to the facts creating this suspicion and to its existence, in apparent justification of the Court's

action in refusing to accord to the title standing alone all those presumptions which it would give to a patent from the United States.

In the case of *Gonzales vs. Ross*, 120 U. S., 629, this Court quotes with approval from the case of *Byrne vs. Fagin*, 16 Tex., 391, that—

"Where there is a testimonio there is a presumption that the original is among the archives of the land office in its proper place of deposit. At all events, it is for the defendants to show by proper proof that it is not there."

In following Blackstone's suggestion that we examine the old law, then the mischief and then the remedy, we have already seen that under "the old law" the production of the titulo itself and the proof of its authenticity would immediately raise the presumption that the grant had been "duly recorded" in the archives.

We have further seen that the mischief rested in the fact that it was comparatively easy after the acquisition of California for Pio Pico, who had been Governor of that Territory, to manufacture and antedate grants which it would be difficult to defeat under the well-settled presumptions of the "old law;" and that, therefore, the remedy which the necessities of the times had forced upon this Court was adopted by our Minister when entering upon the treaty with Mexico for the acquisition of the lands comprised within the Gadsden purchase. It is fair to presume, therefore, that it was the intention of both the parties to that contract or treaty that only such evidence that the grant had been duly recorded should be required, as the investigations of this Court had already demonstrated to be absolutely necessary in order to protect this Government from being despoiled of its property by fraud.

TREATY TO BE LIBERALLY CONSTRUED.

So far as the rights of individuals are concerned, courts in the construction of treaties adopt those general rules applied in the construction of statutes, contracts, and written instruments generally, as was held by this Court in the cases of—

The Amiable Isabella, 6 Wheat., 1.
U. S. vs. Percheman, 7 Pet., 832.
North German Lloyd S. S. Co. vs. Hedden, 43 Federal Rep., 20.
United States vs. Payne, 8 Fed. Rep., 892.

And when a treaty admits of two constructions, one restrictive of the rights that may be claimed under it and the other liberal as respects such rights, the latter is to be preferred.

Sharkes vs. Dupont, 3 Pet., 242.
Hauenstein vs. Lynham, 100 U. S., 483.
1 *Kent Com.*, 174.

"No construction of a treaty which would impair that security to private property which the laws and usages of nations would, without express stipulations, have confirmed would seem to be admissible further than its positive words require."

Strother vs. Lucas, 12 Pet., 438.

In the case of *Chew Heong vs. U. S.*, 112 U. S., 536, Mr. Justice Harlan, speaking for this Court, said:

"Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected; and it would be wanting in proper respect for the

intelligence and patriotism of a co-ordinate department of the Government were it to doubt for a moment that these considerations were present in the minds of its members when the legislation in question was enacted."

It cannot be doubted but that Congress, when conferring jurisdiction upon this Court to determine the validity of these land-grant titles, had in mind the former decisions of this Court as well as the confused and disorderly condition of the archives which are supposed to contain the records of these grants in Mexico.

It was not stipulated in the treaty that the Mexican Government should turn over to the United States that portion of its archives relating to the lands which had previously been granted by the Mexican Government within the limits of the territory acquired by the United States under the Gadsden treaty.

This Government never expressed a doubt or a suspicion, either by word or act, but that the integrity of those records would be as safely preserved and maintained by the Mexican Government after the treaty as this Government could or would maintain the same if in its own possession.

No effort has ever been made by this Government to secure that portion of those records *in toto* which relate to the lands within its borders. The owners of these grants have been left at the mercy of the agents of both the Mexican Government and this Government in regard to the preservation of the records upon which the validity of their titles is made to depend for nearly half a century.

When official documents connected with the record of a grant are now produced from said archives and are shown to be in the official custody of the keeper thereof, it will not do for this Government, through its counsel, to suggest or urge fraud on the part of the Mexican officials based upon mere surmise, inference, and illogical arguments.

As was said by this Court in the case of *U. S. vs. Auguysola*, 1 Wall., 358:

"When there is any just suspicion of fraud or forgery, the defense should be made below, and the evidence to support the charge should appear on the record. If testimony of witnesses is alleged to be unworthy of belief, the record should show some reason to justify the Court in rejecting it. The former opinions of this Court may be referred to on questions of law, but cannot be quoted as evidence of the character of living witnesses."

THE EXPEDIENTE IS THE RECORD OF A GRANT.

It seems to the writer that the true construction to be given to the words "duly recorded" as contained in the Gadsden Treaty is that the records or archives should contain the original papers of the original proceedings from the filing of the petition to the payment of the money by the grantee.

These proceedings were all required to be in writing and were finally all attached together, and constituted the only record evidence in the possession of the Government which would disclose the particular and specific portion of the public domain which had been alienated by its officers. The evidence contained in these expedientes is certainly of far more value in investigating the regularity of the issuance of a title than such entries as were sometimes made in a book of Toma de Razon could possibly be. The latter was merely a "short record" of the grant, as was said by this Court in one of the cases from California; but the expediente was the complete and full record of the grant, upon which the Mexican Government relied for information as to the regularity of the proceedings and as to the specific land which had been sold, as shown by the original proceedings of survey which it always contained.

In the case of *Hanrick vs. Barton*, 16 Wall., 172, this Court said:

"But the set of documents which make up the original title papers of any tract of land from the original petition of

the grantee to the final extension of title (usually called in Mexico the expediente) do belong to the public archives. They either have to pass under the examination and approval of the different officials concerned in granting out the public lands as the basis of their acts or they are the very acts themselves of those officials, constituting the preliminary and final acts of title, demonstrating for all future time the alienation of a specific portion of the public domain."

The expediente is original in all its parts and must necessarily be a much higher order of evidence than the mere note of the fact that a title had been issued, which was made in a book of Toma de Razon, and which did not describe the land alienated except by name of the tract.

In the case of *Peralta vs. U. S.*, 3 Wall., 440, this Court said:

"The Mexican nation attaches a great deal of form to the disposition of its lands and requires many things to be done before the proceedings could ripen into a grant, but the important fact to be noted is that a RECORD was required to be kept of whatever was done. These records were a guarantee against fraud and enabled that government to ascertain with accuracy what portions of public lands had been alienated from the records of the grant, and without it the title was not divested."

Here we have a direct and positive statement by this Court that the record of the proceedings—that is, the record "of whatever was done"—constituted the grant, and that without this record, to wit, this expediente, the title was not divested, and it logically follows that with this record the title was divested. The absurdity of the contention that the Toma de Razon entry was the only record of the grant which was intended by the words used in the Gadsden treaty is glaringly apparent when we come to apply it to an imperfect grant, as in the case of a grant of lands where the grantee made the proper payment of the fees and took possession of the land, after having complied with every requirement

of the law upon his part, but the official entrusted with the issuing of the title delayed issuing the title paper for many years thereafter. In that case no "record" of the grant could possibly exist in the archives of Mexico, as no Toma de Razon entry of the fact that title had been issued could truthfully have been made, and hence the provision of the treaty requiring a grant to have been "duly recorded" would be stripped of all its force and efficacy when applied to any imperfect grant, and it will surely not be contended that no imperfect or uncompleted grant was to be recognized under the treaty, as express provision is therein made to the contrary, and is likewise made in the act creating the Court of Private Land Claims.

In the case of *U. S. vs. Castro*, 24 How., 349, this Court, speaking through Chief Justice Taney, said:

"The general rule is that the grant must be found in the proper office among the public archives; that is the highest and best evidence."

We have just seen that in the Peralta case and in the case of *Hanrick vs. Barton* this Court declared that the expediente (the record which is required to be kept of whatever was done) was "the grant," and hence it follows, as the deliberate declaration of this Court, that the expediente "is the highest and best evidence" of the grant and of its record.

The rule laid down by this Court in so many cases that no grant would be recognized as valid under the treaty of one Guadalupe Hidalgo without some record evidence of the grant in the archives of Mexico was undoubtedly intended to be the rule which should apply under the Gadsden Treaty and which was expressed in the words "duly recorded."

That this Court considered the expediente alone as constituting a sufficient record under that rule is demonstrated by its decision in the case of *Hornsby vs. U. S.*, 10 Wall., 224.

In that case the grant was made only 51 days prior to

the date upon which the military forces of the United States took possession of California, and on which date the authority and jurisdiction of Mexican officials are considered as having terminated therein. The grantee never took possession of the land prior to the treaty. The grant consisted of over forty thousand acres of land, and its authenticity depended "on the testimony of a single witness, unsupported by any proof, except the imperfect or mutilated expediente found among a mass of loose papers on the floor of one of the rooms of the custom-house at Monterey, after the Mexican officials had fled on the approach of our forces." (See dissenting opinion of Justice Davis.)

TOMA DE RAZON ENTRY NOT AN ESSENTIAL PART OF THE RECORD OF A GRANT.

The writer would not consume the time of this Court by a discussion of this question if he depended solely upon his own view of its importance; but a full presentation of his views seems to be required, or at least to be justified, by the fact that two of the members of the Court of Private Land Claims—Justices Murray and Fuller—concurred in an opinion holding that such an entry is the only record evidence of the grant which is sufficient to establish its validity within the terms of the Gadsden treaty requiring the grant to have been "duly recorded."

The opinion of these two justices is found on pages 333 and 334 of the Record. The learned justices have been unable to cite us to a single law or regulation—National, State, or Departmental—which was in terms expressly or by construction or by implication applicable to this grant at the time it was made by the proper official of the Department of Sonora in April, 1844.

The only law cited by them on the subject is that of December, 1846, more than two years after this grant was made, and requiring a note or Toma de Razon entry of

grants to be made and kept in the City of Mexico, but not requiring such an entry to be made or kept in the archives of the State or Department.

Even if said law did apply to this grant, this Court would presume that such an entry was made in the City of Mexico, for the reason that there is no evidence in the record to the contrary, and if such an entry was required it is a duty which was imposed upon some official to be performed by him after the grantee had completed every requirement of the law upon his part and had paid his money to the government, thus securing a perfect, equitable title to the land, as has frequently been held by this Court.

Articles 30 and 31 of said law of 1846 read as follows, to wit:

"30. The corresponding title to the property shall be issued by the Bureau of the Department to the person to whom the sale is made, which once made cannot again be opened.

"31. Every deed of sale shall be signed by the Board, and Toma de Razon thereof shall be made in the General Treasury of the Federation."

It will thus be seen that the law did not expressly require the Board or officer to make the Toma de Razon entry prior to the delivery of the title, and the making of such an entry may therefore be considered as the duty imposed upon one of the officials of the government which is to be performed after both the legal and the equitable title have vested in the grantee.

It is unnecessary to cite authorities to this Court to the effect that the failure of an officer of the government to perform such a duty can in no way injure the grantee. This principle was uniformly adhered to in all California cases which came before this Court.

The writer has not been able to find any law requiring a Toma de Razon entry of the grant to be made in a separate book, and the evidence in this case clearly shows that there

was no uniform custom or usage to that effect ever in existence in the State or Department of Sonora.

742 COMPLETED GRANTS IN ARCHIVES OF SONORA AFFIRMATIVELY SHOWING TITLE ISSUED AND ONLY 365 TOMA DE RAZON ENTRIES.

The present officer in charge of the archives at Hermosillo, whose title is that of "Keeper of the Archives," Mr. B. Rochin, testified, as shown at page 25 of the Record, that his duty is to keep all documents that are in the Treasury Department under his own responsibility, and that he is appointed by the Treasurer General of the State in conjunction with the Governor.

At page 26 he states that he knows of many grants the expedientes of which are found among the archives in his office that are not noted in any book of Toma de Razon. At page 31 he states that when he received the appointment the land titles were in complete disorder and complete abandonment, and his testimony shows that this was in the year 1888. He states the cause to be that when the archives were moved from Ures to Hermosillo they were in the greatest disorder and were not straightened out until he took charge of them; that the first thing he ever did by order of the Government, as the keeper of these archives, was to arrange the land titles and to prepare a statement showing the condition of those titles, which statement was put in evidence in this case.

At page 32 he states that in preparing that official statement (or, as he puts it, "in preparing the Toma de Razon of my own archives") he examined all of the expedientes, and that in every case in which he stated in that official report that the expediente was complete he meant that it contained the statements to the very last, "even to the payment of the fees," and that he did not examine the books of

Toma de Razon which are in the archives for the reason that he was making his own.

This official report upon the condition of the archives at Hermosillo, which was made by Mr. Rochin in the year 1889, *contains a total of* 1,193 *grants. It shows and states that there are* 742 *completed grants in said archives, or, in other words, that there are* 742 *grants in said archives which bear positive evidence upon the expedientes that the proper fees were paid to the Government for the land and for the issuance of title papers, and that such title papers were actually issued.*

In the only two books of Toma de Razon which are in said archives we find but 365 *entries* stating that titles had been issued.

He states that the Toma de Razon entry is nothing but a statement of the time when the title was issued and of the amount of land, and that said book does not contain a description of the lands except by the name of the grant.

In the case of *U. S. vs. Earl B. Coe*, in case No. 591, October term, 1894, now on appeal before this Court, the record shows that Victor Aguilar, then Treasurer General of the State of Sonora, testified in that case that the expediente of title is the original official record, and that the mere fact that the grant is not registered in the Toma de Razon did not divest the purchaser of the lands, and that the fact that the entry was not made in the Toma de Razon was not proof that the title was not valid under the laws of Mexico, and that the entry that title had been issued upon the expediente was sufficient Toma de Razon itself. In explanation of this testimony, it may be said that the words "Toma de Razon," liberally construed, mean simply a note or memorandum.

In the same case Mr. B. Rochin, the Keeper of the Archives, testified that there are many grants in the archives which are not registered in any book of Toma de Razon and which are recognized as perfect titles.

The evidence was then being taken at Hermosillo before one or more members of the Court of Private Land Claims,

and Mr. Rochin offered while testifying to show many expedientes having at the bottom of them the note of Toma de Razon that the title was issued, the names of which grants do not appear in any books of Toma de Razon.

Mr. G. H. Robinson testified in that case that all the proceedings relating to a grant of land were originally taken down on loose sheets until the whole of the proceedings were completed, and then sewn up together, and were then called the expediente, and that it is the original record of the grant; that the book of Toma de Razon was for the information of the Treasurer General; that he personally knew of several grants then in existence as valid titles, and recognized by the Government as valid titles, which do not appear in the book of Toma de Razon; that from time immemorial and in the time of the kings all these expedientes were kept as they are today, and there can be seen in the archives of the Treasury Department documents of the same class, kept in the same manner, and that the making of these expedientes was a matter of ancient custom and based undoubtedly on old Spanish laws.

Mr. B. Rochin, the Keeper of the Archives, testified at page 35 of the Record in this case, that he did not examine either of the books of Toma de Razon in his office in making up his catalogue or official record for the reason that "*the expedientes were sufficient for me, because amongst us the Toma de Razon is not necessary.*"

He further explains that—

"*The completed expedientes that I have mentioned there were those that had all the requirements of the law for these titles, and had, besides the payment of the money, the last sales, and that a note should be made on that expediente in the matrix of it that a title for the land had been issued; that is a complete expediente.*"

Again he said, referring to these completed expedientes:

"*Upon those expedientes there was a note made noting the fact of the date on which the title was issued.*"

At page 38 of the Record, Mr. Rochin says:

"An expediente contains everything. There is the petition presented by the party asking for the land, and the report made that the party asking for the land is able to settle it or take charge of it, and then the granting clause—first, the survey and payment of the fees, and at the very last of it there is a note made that the title has been issued, and a copy of the expediente is the testimonio."

REPORT OF SPECIAL AGENTS FLIPPER AND TIPTON SHOWS THAT A TOMA DE RAZON THAT TITLE HAD BEEN ISSUED WAS USUALLY PLACED AT BOTTOM OF EXPEDIENTE.

From the report of Special Agents Tipton and Flipper upon the condition of the archives at Hermosillo we find that an endorsement was usually made at the end of the expediente, over the signature of the granting officer, that final title had been issued on a certain date, and whenever that certificate failed to appear upon an expediente those two gentlemen, who have undoubtedly had vast experience in these matters, immediately entertained the presumption that because of said absence the title to that grant had never been completed, and in their earnest partisan zeal on behalf of the interests of the Government they even jumped at this conclusion and would indulge this presumption where that endorsement does appear at the end of the expediente, but the granting officer failed to sign it.

It is a pity that these Special Agents of the Department of Justice did not make an accurate list of all the expedientes which contain these certificates that title had been issued and then compare that list with those two books of Toma de Razon which are in the archives, so that this Court might draw its own inference as to the exact extent to which the custom of making a note in a separate book, or on a separate sheet of paper from the expediente, that title had been issued, did prevail within the jurisdiction of the State or Department of Sonora.

In the absence of any express law, either State, Departmental, or National, requiring such an entry to be made prior to the year 1846, and in view of the fact that such a national regulation did exist as to the territory comprised within the present State of California, such information would be of undoubted value; and in view of the fact that the attention of those Special Agents for the Government had been attracted to this question; and in view of the further fact that this question has arisen in nearly every one of the Arizona grants; and in view of the further fact that they must have been aware that two members of the Court of Private Land Claims had held in this case that such an entry in a separate book of Toma de Razon is the only evidence of record of a grant; and in view of the further fact that Special Agent Flipper was an adverss witness in this case, claiming an interest in the land involved, it seems incomprehensible that those agents did not seek this information, and it is only fair to account for that fact by presuming against the Government in this case that the information was not produced for the reason that it would not support the contention which is made on the part of the Government that such an entry is an essential part of the record of title.

DESCRIPTION AND CHARACTER OF THE ONLY TWO BOOKS OF TOMA DE RAZON NOW IN ARCHIVES OF SONORA.

In this country we are accustomed to seeing records kept in books with bound covers, from which no leaves can be extracted without the fact being immediately discovered and into which no leaf can be inserted that is not originally there when the book was manufactured without the fact being discovered. Imagine one's feelings on picking up a "little pamphlet of Don Miguel Riesgo, in which there are five or six Toma de Razons," as Mr. Rochin contemptuously described it (see Record, p. 34), and to realize that little

book, containing only twelve uncovered leaves, and upon only five of which are there any entries of titles, and from which Mr. Rochin, without any hesitation, cut one of the blank leaves in the presence of Messrs. Flipper and Tipton, at the time they were preparing their report, for the purpose of patching a torn archive.

See pages 2, 3 of Special Report by Messrs. Flipper and Tipton.

That little book is in size about four inches one way by five the other. It has no cover, and the leaves are separate sheets, sewn together in the most rude manner. This book is marked "No. 1" on the first page, and there contains the following superscription: "Book in which is kept an account of the titles that are being issued by this Commissario General and of the certificates presented by parties in interest, in which they show that their titles are in Mexico for their confirmation." The first entry in the book is dated December 11, 1824, and the last entry is dated May 13, 1825, and the total number of entries is five or six, as just stated.

See testimony of Rochin, and also Supplemental Report of Messrs. Tipton and Flipper, page 2.

ERRONEOUS STATEMENTS IN REPORT OF SPECIAL AGENTS FLIPPER AND TIPTON.

In connection with this book, I am compelled to call attention to the fact that the report of Messrs. Flipper and Tipton, which is of great value in many respects, is not entirely reliable, as the zeal of Mr. Flipper to defeat any and all Arizona grants seems to have led him into more than one gross error. That report states that there is no other book of Toma de Razon in the archives except one commencing in the year 1831; and yet said report, on pages 17 to 29, contains a list of nineteen expedientes which bear upon them an endorsement that final title was issued in the

year 1825, after May 13, including the San José de Sonoita, which is now before this Court on appeal, and the San Rafael de la Zanja, which is now pending before the Court of Private Land Claims; and said report proceeds to say, at the end of the abstract of each one of said nineteen grants, that "the book of Toma de Razon for 1825 is in the archives, but contains no entry of this title."

In the case of the San Rafael de la Zanja the report says, at page 20:

"The book of Toma de Razon for 1825 is in the archives, but contains no entry of this title; the last entry is May 13, 1825, and is followed by blank leaves."

The report also states that—

"An endorsement over the rubric of José Maria Mendoza states that final title was issued May 15, 1825."

The evident intention of Mr. Flipper is to convey the impression that this San Rafael is open to suspicion for the reason that there are blank leaves in that book of Toma de Razon containing a few entries of titles issued in 1824 and 1825, and that the entry of the San Rafael de la Zanja should have followed immediately after the last entry of May 13, 1825, which is in said book. The same thing must have been intended by him as to the Sonoita grant, in regard to which the report says:

"An unsigned endorsement says that final title was issued May 25, 1825."

This is an error, as it was May 15, 1825, the same day as the San Rafael de la Zanja grant.

The titulo of the Sonoita grant (see Record, Case No. 181, October term, 1896, this Court) contains the following endorsement at its end, to wit:

"Note of this title is found on page 3 of Book No. 2 of this general commissario."

The titulo of the San Rafael de la Zanja grant, which is on file with the clerk of the Court of Private Land Claims, and which undoubtedly has been examined by Messrs. Tipton and Flipper, contains the following:

"This title is recorded in folio 3 of Book No. 2, which exists in this general commissario."

Mr. Flipper assisted the attorney for the Government in the trial of the Sonoita case before the Court of Private Land Claims. It is hardly possible that his attention was not called to the fact that the titulo of that grant and of the San Rafael de la Zanja grant recites the fact that the Toma de Razon entry was made in Book No. "2" and not in Book No. "1."

As early as 1879, in his official report in the archives, Mr. Hopkins states "that notes on expedient's of grants of land in the Government archives of Sonora show that about the year 1825 a number of grants were issued by the above-named officer on proceedings which under the Spanish Government had not gone beyond the provincial Junta de Hacienda, having doubtless at that point been arrested by the revolution of 1821. In these cases no borradores or draughts of title are found in the expedientes, but *notes are found of the register of the grant in Cuarderno (Book) No. 2, in the office of the Commissario General.*"

We find this statement published in the report of the surveyor general of Arizona, at page 1128 "of the Public Domain."

Mr. Hopkins expressly states that he secured this information from the notes on expedientes of grants of land in the Government archives of Sonora, as I understand the reading of his statement.

The report of said special agents contains another glaring instance of the extent to which Mr. Flipper is willing to go in order to make the worst case possible against an

Arizona grant. At page 10 of the report we find the following:

"163. Tumacacori y Huevabi (Arizona).—There is absolutely no record of this grant of any kind in the archives."

Mr. Flipper was present in the Court of Private Land Claims during the trial of this case and heard the testimony of Mr. Rochin and examined the documents which appear in the record between pages 238 and 239 and satisfied himself that the handwriting of said documents was that of clerks who were in the Treasury Department at the date upon which those papers purport to have been made, and yet he makes the unqualified statement that "there is absolutely no record of this grant of any kind in the archives."

The recklessness of such statements by Mr. Flipper is evidenced by the fact that at no time did he ever have free and unrestrained access to all, or even to a considerable part, of the records relating to land grants in said archives at Hermosillo. He and Mr. Tipton went there with a list of grants which had been cited by Mr. Rochester Ford in a brief filed by him, and on pages 1 to 5 of their report the special agents state the difficulties under which they labored in securing access to any grants except those located in Arizona.

It is a well-known fact that the records of the Arizona grants are not maintained separately and by themselves, and hence it is apparent that the only way in which these gentlemen secured the records of any grant in Arizona was by having a list of the grants whose records they desired to inspect, and by asking the keeper, Mr. Rochin, to furnish them with such records as related to each one of the said grants in turn.

That this is the method which was pursued in regard to the other grants examined by them is apparent from the statement made by them in relation to the Santa Rosa grant at page 29 of said report:

"146. Santa Rosa.—The keeper of the archive was unable to find this expediente in the archives. He assured us that it was there, but it had been misplaced."

The Santa Rosa grant is not an Arizona grant, and the only fact which induced Messrs. Flipper and Tipton to request the records of this grant for inspection was that it was mentioned by Mr. Ford in his said brief in the Canoa case. Mr. Ford took his list of grants from the list of grants from the Official Catalogue which was prepared by Mr. Rochin, and at page 97 of that Catalogue the Santa Rosa grant is listed by Mr. Rochin, and the statement is made that title was issued upon it in 1839.

Messrs. Flipper and Tipton did not state that they were unable to find their expediente in the archives, but that the Keeper of the Archives told them that he was unable to find it.

Neither do they state as a matter of fact that the expediente of said grant is not in said archives or, as they said in the case of this grant, that "there is absolutely no record of this grant of any kind whatsoever."

But as this Santa Rosa grant was not an Arizona grant, they content themselves by simply stating that the Keeper of the Archives was unable to find it, and that he assured them that it was there, but had been misplaced.

Perhaps these gentlemen requested the Keeper of the Archives to give them the records relating to the Tumacacori and Calabasas grant for examination, and perhaps for some reason of his own he may have seen fit not to let them handle the papers which are of so much importance to us and which appear in the record of this case, knowing, as he did, that they had both examined them in the Court of Private Land Claims; but that fact would not justify these special agents of the Government in making the unqualified statement in their official report which I have just quoted, and more especially would they not be justified in making said statement when both of them knew of the existence of

those papers at the time they made said report, and also doubtless knew that such papers were kept by Mr. Rochin in some private receptacle, drawer, or desk in his office.

DESCRIPTION OF BOOKS OF TOMA DE RAZON CONTINUED.

The two books of Toma de Razon are fully described in the testimony of Mr. Rochin, at page 26 of the Record and in the Supplemental Report of Messrs. Flipper and Tipton, as well as in the testimony of Mr. William M. Tipton, said special agent, which was taken in the matter of the Algadones grant and appears in the record, case No. 591, October term, 1894, of this Court.

The following question and answer appear in the testimony of Mr. Tipton in that case, to wit:

"Q. When you speak of leaves, did not this book consist originally of loose sheets of paper which were at some time sewn together?

"A. It was evidently sewn together at one time; yes.

"The first 68 pages or leaves of said book are all one kind of paper. Leaves 69 to 74, both inclusive, are on a different kind of paper; leaves from 75 to 78, both inclusive, are on paper bearing a printed stamp inscribed 'San Tesoreria;' leaves 79 to 82, both inclusive, are on paper not stamped; leaves 83 to 86, both inclusive, are on unstamped blank leaves, and 86 is not numbered, upper right-hand corner being torn off; whole number of leaves, 86."

See Supplemental Report of Messrs. Flipper and Tipton, page 6.

The last entry in this book is dated December 6, 1849.

This entry is followed by blank leaves.

Grants of land continued to be made by the Treasury Department of Sonora during the years 1850, 1851, 1852, 1853, 1854, 1855, 1856, and 1857, up to the date of the adoption of the new constitution in that year. This is not only a notorious fact, but the expedientes in the archives demonstrate its truth. It is also well known that many grants were made

by the State officials between the year 1825 and the year 1831; yet no explanation is attempted on the part of the Government to show why no book of Toma de Razon was kept during those years or the fact that such books were kept and were lost or destroyed.

In examining this book of Toma de Razon we find that it contains not a single entry of Toma de Razon of any grant made in the year 1840, and not a single entry of a grant made in the year 1842, and not a single entry of a grant made in 1844. In his letter of February 23, 1839, to the Secretary of State of the Department of the Treasury of the Republic, the Superior Chief of the Treasury states that parties who have registered grants are clamoring for their title papers, and urges that he shall receive immediate instructions in regard to the issuance of the same.

On May 26, October 17, and November 5 of the same year he wrote other letters to the Department requesting advice in regard to the manner of issuing these titles. Is it reasonable to suppose, in view of these facts, that no one single title was issued by him in said year 1840, or is it not more reasonable to suppose that he made the entries in favor of the interested parties upon loose separate sheets of paper, and that afterward, in the year 1845, this same Mendoza gathered up all the loose sheets of paper containing such entries of titles and sewed them together and placed his rubric upon each sheet, and placed at the end of those sixty-eight leaves the statement which we find in the Supplemental Report of Messrs. Flipper and Tipton? It might be suggested that said Mendoza did not issue any titles in the year 1840, for the reason that he was waiting to receive his instructions; but this suggestion is of no weight, for the reason that said book of Toma de Razon contains twenty entries in the year 1839, nearly all of them after the date of said letter of February 23, 1839, and all signed by said Mendoza.

On December 20, 1840, he had received the instructions for which he asked, and said book contains twelve entries

in 1841, all signed by Mendoza except three, which are not signed.

There is not a single entry in said book during the year 1842. What has become of all the applicants who were clamoring for titles? Mendoza stated in said letter that the issuing of the titles probably occupied the greater part of the labors and mechanism of his office, and that many proceedings were then pending in said office relating to the sale of lands, and that many new ones were being instituted "more and more every day." This would not lead us to the conclusion that no single title was issued in either one of the years 1840, 1842, and 1844.

OTHER GRANTS WERE MADE IN 1844 WHICH DO NOT APPEAR IN BOOK OF TOMA DE RAZON.

On page 14 of the official catalogue which was issued by Mr. Rochin is the following entry, to wit:

"Bacochibampo. (Rancho de) Municipalidad de Guaymas. Distrito del mismo nombre. Estado de Sonora. Un Solar y tres norias pertenecientes á la Nacion y situadas en dicho rancho, adjudidas en 1844 á Antonio Bustamante."

Counsel for the Government insist that this record does not disclose that title had been issued upon this grant. I take issue with him upon that fact, and will take up the time of this Court with but two illustrations in support of my position. Turning to the top of page 105 of Rochin's Catalogue, we find the following entry:

"San Jose del Cabrizo. (Rancho de) Municipalidad de Rio Chico Alamos. Estado de Sonora—Dos y cuarto sitios de terreno registrado en 1823 por D. José Antonio Garcia, a quien se adjudico en 1825."

Mr. Rochester Ford examined the original expediente of this grant at Hermosillo and informs me that Mr. Rochin's spelling of the word "Cabrizo" is an error, and that it should

be "Carrizo," and that this is the same grant which is mentioned at page 22 and the top of page 23 of the official report of Messrs. Flipper and Tipton. That report states that the expediente contains the following endorsement, to wit:

"The Commissary General states that full title was issued May 15, 1825."

I may add that the Toma de Razon entry of this grant was probably in said Book No. "2."

Messrs. Flipper and Tipton call attention to the fact that the certificates for patent of those lands is dated Arispe, May 2, 1831, six years after the title purports to have been issued, and were signed not by Commissary General Riesgo, who issued the title, but by the State Treasurer General, José Maria Mendoza.

Mr. Ford sets forth this part of the expediente of said grant in full on pages 22 and 23 of Appellant's Reply Brief in the case of Santiago Ainsa *vs.* U. S., No. 27, October term, 1897, of this Court.

On page 24 of said brief Mr. Ford says: "The latter part of this criticism is an error." As the document itself shows, as above set out, Mendoza signs not as State Treasurer General, but as *Commissario of the section of the Treasury of Arispe, in the State of Sonora.* He was a Federal officer, and his action in accepting this payment six years after Commissary General Riesgo had issued the title is a recognition of the validity of the act of the intendants and commissaries which cannot be gainsaid.

It was nothing unusual for the final title paper to be issued and its delivery withheld, as in the case just cited, till payment was made. A similar state of facts appears in grant No. 36, the payment for which was not made till June 16, 1831, as appears from the following record:

Mr. Ford then sets forth another record and says, at page 25 of his brief:

"That Mendoza was at this time a Federal official appears from the statement in the official report of the Government, at the top of page 33."

By "official report of the Government" Mr. Ford means said report of Special Agents Flipper and Tipton, to which I have so often referred.

Another instance of the same use of the word "adjudidas" or "adjudico" to signify that title had been issued is found in the Seri grant, near the bottom of page 103 of Rochin's Catalogue, which reads as follows, to wit:

"Seri. (Rancho del) Municipalidad de Hermosillo. Estado de Sonora, tres sitios de terrno registrado en 1826 por D. Fermin Mendez, a quien se le adjudico en 1838."

The report on this grant by Messrs. Flipper and Tipton is at pages 69–70 of their report and contains the following, to wit:

"An endorsement by State Treasurer General José Maria Mendoza that title was issued February 20, 1838. Treasurer General Mendoza reported February 15, 1838, to the Governor, who ordered said title issued, payment dated February 17, 1838. Endorsement by State Treasurer General José Maria Mendoza that final title was issued February 20, 1838. Book of Toma de Razon for 1838 is in archives and contains the same on page 2 of leaf 52."

There certainly can be no question about the legality of the record of this grant and of the facts that payment was made and that title was issued, as we have the double assurance of the expediente and the entry in the Book of Toma de Razon. There can be no doubt, therefore, but that Mr. Rochin used the word "adjudico" as meaning the title had been issued.

This word is frequently used in the granting clause of title papers used by the Mexican government. In the titulo of the Senoita case, before referred to, we find the following language used:

"I grant, give, and adjudicate," etc.

Hence the fact seems to be conclusively established that at least one other grant was made in the year 1844, and yet we have seen that said book of Toma de Razon contains no entries whatever for said year.

We have seen by the official record prepared by the keeper of the archives in 1889 that there are 1,194 expedientes on file in these archives. This official statement by Mr. Rochin is corroborated by said report of Special Agent R. C. Hopkins, for in 1879 he reported that he found between 1,200 and 1,500 expedientes in said archives. We have seen that Mr. Rochin's report shows that 734 of these expedientes are complete, or, in other words, show that final payments were made for the land by the grantees, and that the title had been issued to them. We have also seen that less than one-half of these titles were ever entered in any separate book of Toma de Razon.

If we adopt the theory of Justices Murray and Fuller, of the Court of Private Land Claims, that an entry in the book of Toma de Razon is absolutely essential to the validity of a title under the Gadsden treaty, and that it is the only record which can be considered, we are staggered by the obvious and gross injustice of the strict enforcement of such a requirement on the part of this Government the minute we set eyes on the only two books of Toma de Razon which are now in said archives.

Mr. Rochin testifies that these two books of Toma de Razon are the only ones he has ever seen in those archives.

Mr. Hopkins tells us in his report of 1879, *in the most positive manner, that the larger one of these two books of Toma de Razon, to wit, that containing entries ranging from the years* 1831 *to* 1849, *was the only book of record in the said archives at that date.*

We have already learned the confused state in which these records were at the time Mr. Rochin took possession.

All the facts, therefore, seem to lead us up to the inevitable conclusion that said book of Toma de Razon, in which

it is alleged by counsel for the Government that this title ought to appear, was made in the year 1845 by said Mendoza, who seems to have been the most efficient official who ever had charge of said office, and who, upon coming into office again in that year, doubtless attempted to methodically arrange the archives to some extent at least by sewing together these loose leaves. It is even doubtful whether the additional leaves were put in at that time and the cover put upon the book in the form in which it now exists. It is hardly possible that unstamped leaves would have been placed therein by Mendoza, who seems to have given some attention to form.

This book of Toma de Razon bears no number. The unreliability of this book of Toma de Razon and the deep injustice which would be imposed upon individuals by adopting the theory of Justices Murray and Fuller lead me to the belief that this Court will not consider those books as being of any particular value in establishing a record of a title, and will only accept entries thereon as evidence of the grant having been duly recorded, in the capacity of secondary evidence, equal to but no greater in value than the documents which have been put in evidence in this case.

No express law requiring any Toma de Razon entry to be made in a separate book having been cited, and no uniform practice in that respect amounting to a usage or custom having been established, and it appearing that it was almost, if not quite, a uniform custom to make the Toma de Razon of the issuance of the title upon and at the end of the expediente, it must be presumed that the expediente of this grant did contain such an entry.

ANALYSIS OF EVIDENCE PROVING RECORD.

In 1879 the surveyor general of Arizona appointed R. C. Hopkins as a special agent for this Government to examine the records in the archives of Hermosillo relating to land grants in Arizona. That highly intelligent and competent gentleman duly made a report upon the same in July, 1879. In making this investigation said Hopkins was fully aware of the requirements of the treaty that a grant should appear to have been duly recorded in the archives of Mexico prior to the date of said treaty. In making his own report to the Commissioner of the General Land Office said surveyor general of Arizona was likewise aware of this fact; and yet in his report made in 1881 said surveyor general reported this grant as undoubtedly genuine and as entitled to confirmation. The point was not raised on the part of the Government that said grant did not appear to have been duly recorded.

The *bona fide* possession of said grant by Gandara for at least three years prior to the date of the Gadsden treaty was a fact of common knowledge and notoriety in Tucson, Arizona, where said surveyor general was located, and must have been known to the said surveyor general and have had a controlling influence upon the character of his report, and the fact that said Gandara had also been in possession of said land from the year 1861 to the year 1864, at the time he filed his petition for confirmation of the same, must have been known to said surveyor general. Had the point been made at that time that the grant had never been duly recorded in the archives of Mexico, it must have been an easy matter for Gandara to have established the fact by the overwhelming testimony of witnesses who had taken part in the proceedings relating to the sale and of witnesses who had personally seen the original expediente in said archives.

Counsel for the Government say in their brief that be-

cause Gandara secured a certificate from Judge José Aguilar on October 10, 1861, certifying to the regularity and form of the certificate of Judge Ramon Cuen, which appears upon a copy of the original title papers of 1844, attached to a deed from Aguilar to Gandara in 1856, "it is apparent that the importance of a record title was not recognized by the claimants until about that time."

I may frankly admit that the apparent absence of all trace of a record in the archives of Mexico in regard to this grant was not called to the attention of this writer until the March term of the Court of Private Land Claims, in the year 1894, and that he asked for a continuance of the case at that time for the express purpose of making a personal investigation and attempt to discover whether any such record was still in existence.

Only a short time before the Court of Private Land Claims again met for its March term, in 1895, the efforts of this writer resulted successfully after the expenditure of a large amount of time and effort. The witness Carlos Velasco was sent to Hermosillo, and by reason of his personal political influence succeeded in having an exhaustive examination made of the records, by the keeper of the archives, of the mass of loose and unarranged records and papers which were in his possession. This is probably the first thorough examination that was ever made of those papers for any purpose, and it was certainly the first that was ever made to the knowledge of this writer for the purpose named.

The keeper of the archives, Mr. B. Rochin, then discovered the documents relating to this title, which were put in evidence by the claimant and which appear between pages 238 and 239 of the Record.

It is only fair to state further that said claimant acquired this grant in good faith on February 11, 1890, for the valuable consideration of $65,000.

See Record, p. 304.

This conveyance was made long subsequent to the report by the surveyor general of Arizona, stating that said grant was genuine and recommending the same for confirmation to the full extent of its boundaries, as set forth in the title papers.

The claimant offered to prove that he and his immediate predecessors had expended more than $40,000 additional upon the grant in improvements, but the Court of Private Land Claims ruled out this evidence as not competent or pertinent (see Record, page 102), although two members of the Court of Private Land Claims in confirming the Algadones grant, now on appeal to this Court, being case No. 45 of the October term, laid great stress upon the fact that the claimants expended a large amount of money in improving their grant, although no pretense is made that possession was ever taken prior to the acquisition and occupation of the country by the United States.

DESTRUCTION OF RECORDS GENERALLY.

The testimony of Carlos Velasco, at pages 47 to 54 of the Record, and particularly on page 53 of said Record, shows that he examined the archives of Sonora in the year 1875, as president of an investigating committee of the States of Sonora and Chihuahua, as preliminary to making an investigation of the damages caused by American citizens and Apaches on the other side of the line and to investigate the damages caused by Mexican citizens on this side of the line, and that he found those records in a deplorable condition; that they were all mixed up and incomplete; that there was no regularity whatever about them; that there were papers of different years all mixed up indiscriminately, and there were many documents wanting; that the revolutions of 1856 to 1861 or 1862 had resulted in the destruction of many expedientes; that it was publicly known in Sonora that at the time the French troops came into Ures the doc-

uments were kept in the house of the Government, and it had rained there and it was very muddy, and the French troops had thrown these expedientes out into the mud—"very far out they threw them in order to step over them for stepping ground."

Mr. Hopkins also states in his official governmental report that—

"Many of the original archives of the Government have been destroyed in the frequent revolutions which for many years have wasted that unhappy country, and this tradition would seem not to be without foundation, since the very building in which they were kept bears many marks of hostile attacks." * * * "There are no means, however, of ascertaining what, if any, expedientes have been lost or destroyed, since they are not consecutively numbered, nor is there any corresponding book of record in which an entry is kept of these expedientes of grants."

Mr. Hopkins also states in that report that in case of the loss of a testimonio or title paper "a new and legitimate offspring could always be produced from the original matrix (expediente), so long as the same continued to exist in the archives, and in case of the destruction of the matrix (expediente) I presume the legitimacy of the offspring could not be attacked, so long as the same was intact; but the destruction of both the parent and offspring would necessarily end the generation."

It would appear from this statement of Mr. Hopkins that his investigations led him to the same conclusion which has been stated by Mr. Rochin, to wit, that among them the Toma de Razon entry is not necessary, and that the entry upon the expediente that title had been issued or that the fees had been paid was sufficient in itself to warrant the keeper of the archives in issuing a new title at any time. That this is the practice in Sonora at the present day cannot be doubted.

EVIDENCE OF RECORD CONTINUED.

In this case we find in the record much stronger evidence of the fact that the archives of Sonora were lost and destroyed and were in great disorder and confusion after the year 1844 than was produced on the trial of the case of *U. S. vs. Chaves*, cited *supra*, and it seems to follow that if the expediente of the Tumacacori and Calabasas grant was returned to the archives in 1857, it was abstracted or destroyed during the French revolution in 1861–'2.

In addition to this testimony in regard to the loss of records, we have produced documentary evidence which leaves no room for doubt in the mind of any impartial investigator that the expediente of this grant was in the archives of Mexico at Ures, the capital of the State of Sonora, as late as the 10th day of February, 1857. It is not sufficient for the Government to suggest fraud in its argument upon the theory that this expediente was placed there after the year 1844 and by inference after the date of the Gadsden treaty and prior to said 10th day of February, 1857; fraud must be expressly alleged and clearly proven. We cannot be deprived of our title by any such unfair suspicion or inference without a syllable of testimony to support it.

Mr. Rochin testifies that at the time he prepared his catalogue of the expedientes contained in the archives he did not know of the existence of these papers in his archives, and that after he got through forming that catalogue he went through other papers in order to arrange all the papers belonging to the general archives, and placed them in a big book which Messrs Flipper and Tipton had seen, and that he looked for the other papers relating to land matters among the papers of corresponding years whenever he had occasion to need them, and that he found these papers after he made that statement, and that they were in loose leaves—loose pages—which loose pages are contained in five

boxes in his office; that those five boxes were in the office when he took possession of the archives and contained the expedientes from which he made his catalogue.

In their report, at page 5 thereof, Messrs. Flipper and Tipton make the following statement, to wit:

"*We made inquiries as to correspondence between the State or Departmental authorities and the National authorities, and were informed that if any such correspondence existed, which was doubtful, it would be found in the archives of the Secretary of State, but that those archives were very voluminous, unarranged, and in the greatest disorder and confusion, and we found that with the work we already had in hand and the unexpected delay to which we had been subjected it was impossible for us to examine them in the time at our disposal.*"

We have already seen the condition of the archives in the office of the Treasurer General at the time Mr. Rochin took charge. Is it any wonder, therefore, that the appellant did not succeed in discovering the official documents relating to the record of this grant at any earlier day?

The fact that the expediente of the Santa Rosa grant could not be found by the Keeper of the Archives at the time Messrs. Flipper and Tipton were making their examination, although he assured them it was still in the archives, is a fair illustration of the difficulties with which one meets in examining those archives, even at this late day.

Another illustration of the condition of these archives is found in the testimony of Mr. Rochin at page 33 of the Record, where he states that a "cargo y data" is a book which is kept in the Treasury and which shows the amounts that "cargo" (come in) and "data" (go out)—in other words, a book containing the receipts and disbursements of the Treasurer General's office. This is the most important book which was required to be kept in that office, and we have seen that this book was subject to the inspection of the Governor of the State or Department and of the Commander

General of the Army, and that it was the duty of the Governor to inspect it at least once each month. It contained the receipts from the sales of lands. This book for the year 1844 has been lost from the archives and does not now exist therein. (Record, p. 33.)

Mr. Rochin proceeds to state that the book of "cargo y data" is also lost from the archives for other years, and that said book for the year 1833 had been lost from the archives, but that he had been ordered by the Secretary of State to hunt up some law, and he found the book of "cargo y data" for said year 1833 in the archives of the Congress of the State Legislature, and also found other documents there, which he was ordered to bring up to his archives; that he found at the same time and in the same place the book of "cargo y data" for the year 1850. (Record, p. 33.)

HANDWRITING OF BODY OF RECORD EVIDENCE IS THAT OF DEPARTMENTAL CLERK OF THAT PERIOD.

The good faith of the appellant in putting these records in evidence, as found between pages 238 and 239 of the Record in this case, is demonstrated by the fact that he did not content himself by presenting to the Court of Private Land Claims the certified photographic copies of said documents, the fac-similes of which are in this record, but had Mr. Rochin, the keeper of said archives, come more than 400 miles to the city of Tucson, in order that said court might have the satisfaction of examining the original papers, so that their genuineness and authenticity might be tested by a personal inspection on the part of the members of the court, and on the part of the two special experts for the Department of Justice who were present at the trial, as well as on the part of the attorney for the United States, Hon. Matt. G. Reynolds.

Rochin testified, at pages 27 to 31 of the Record, that those documents form a part of the archives which are under his

official custody. He also testified to the genuineness of the signatures upon them, and to the fact that the same handwriting which is contained in the body of the papers appears in many of the expedientes of about that same date, which form a part of the archives in his charge.

Special Agents Flipper and Tipton, as well as the attorney for the Government, examined all four of those papers before they were offered in evidence, and Mr. Flipper testified as a witness in this case, and qualified himself as having an expert knowledge of the handwritings of different officials, which appear in the archives at Hermosillo, and yet all four of these documents were admitted in evidence without any objection on the part of the Government and without their authenticity or genuineness being questioned in any way.

At page 28 of the Record Mr. Rochin testifies that the handwriting in the body of the papers is that of one of the clerks who was in the office of the Treasurer General of the State of Sonora at that period of time, as is evidenced by many other documents therein bearing the same handwriting.

BEST EVIDENCE PRODUCED AS TO GENUINENESS OF DOCUMENTS.

Other original documents were also offered in evidence and proofs of their genuineness made, not only by the testimony of Mr. Rochin, as appears upon pages 26 to 31 of Record, but by the testimony of Don Eufemio Tapia, who was the provisional treasurer of Sonora at the time of the proceedings mentioned in them. Tapia also testified in regard to the record documents contained between pages 238 and 239 of the Record. I particularly invite the attention of this Court to the entire testimony of said Tapia. Counsel for the Government have attempted to place a construction upon some parts of it that will not bear the test of a candid inspection of the entire testimony.

The earnest effort of the writer to throw light upon the

question of the authenticity of these documents is further shown by the fact that said Tapia was likewise brought from the State of Sonora to testify in person before said Court of Private Land Claims instead of his deposition having been taken in Mexico.

Tapia stated that he was 71 years old and that he had about forgotten how to read his own language. (See Record, pp. 42 to 47.)

He could not speak English nor understand it, and the writer could neither speak nor understand the Mexican language.

DIFFICULTY OF PROCURING EXACT INTERPRETATION OF EVIDENCE.

The difficulty of getting exact interpretations by the official interpreter is sufficiently illustrated in the record in connection with the examination of the witness Jesus Marie Elias. At page 66 of the Record, in answer to the question "How long after that was it that you went down there and saw that north monument?" the witness was made by the interpreter to reply as follows, to wit: "A. I can't remember at present. I don't remember. I think it was ten or twelve years afterwards."

At page 70 of the Record we find the following, to wit:

"Continuation of trial pursuant to adjournment:

"JOSE MARIE ELIAS recalled.

"By Mr. HENEY: During the recess I have had my attention called to three or four serious errors made in the interpretation of the answers of the witness. I am told this by gentlemen highly educated in the Spanish or Mexican language. I am satisfied they are not due to any intention, but I suggest that the interpreter should be more careful. I am told that where the witness said 'two or three years' it was interpreted 'twelve or fourteen years,' but I am told the Spanish for these words is very similar.

"By the COURT: Very well; make your corrections.

"Q. How long after the surveyors told you about this monument or how long after you heard the surveyors talking about the monument at San Xavier was it until you went to the place and identified the place yourself where the monument was?

"A. Two or three years.

"Q. Now, another thing, I tried to get you (the interpreter) to put it to him whether he was positive about 1851, and he now says he never understood that question to be put that way. Now, put it to him literally as I ask it. I do not mean this as a lecture, but I wish to have it certain. Are you positive as to the time that Frederick Hulseman first came to Calabasas?

"A. I am not certain about the day or the month, but in the year 1852, when I went from here to Magdalena, in passing by there, and when I came back again in the same year he was already there.

"Q. Do you know positively whether he was there in 1851 or not?

"A. I do not."

These two answers of the witness were very important, and especially the first one, in which he was identifying one of the monuments of the grant, and in which it was made to appear by his testimony, as interpreted, that he had not gone there until ten or twelve years after the place had been described to him instead of two or three years thereafter.

In regard to the other question, he had been made to state positively that Gandara was not in possession of the grant in the year 1851, when as a matter of fact the witness had not gone by there until the year 1852, when he did find Gandara in possession and without knowing how long Gandara had then been there.

TESTIMONY OF EUFEMIO TAPIA.

When the writer was examining said witness Tapia he was finally compelled to put some leading questions. At page 45 of the Record the following appears:

"Now, these papers that were sent to you to examine—this title—were they the original papers that were on file there in the archives?

"Objected to by counsel for the Government as a cross-examination of his own witness and as calling for a categorical answer.

"By the COURT: It is leading, but it seems difficult to get the witness to comprehend. Objection overruled.

"A. Yes, sir; after I made that report the papers that had been sent to me were returned to the place from which they had been sent."

At page 47 of the Record the following appears as the testimony of said witness Tapia:

"*Q. Do you know the difference between the papers called the expediente that are kept in the archives and the ones given to the possessor of the land? Yes or no is all I care for.*

"*A. Yes, sir. The first one is the original, and the testimonio is the second.*

"*Q. Now, the papers that were sent to you for examination were sent from the archives, were they not?*

"*A. Yes, sir; from the Officina de Liquidacion.*

"*Q. And they were originals, were they not?*

"*A. That office sent to me the papers.*

"*Q. And those are the papers that are kept in the office and not given to the ones that buy the land?*

"*A. Yes, sir; they are the originals.*"

It will be seen, therefore, that the witness Tapia distinctly and positively testified that the title papers of the Tumacacori and Calabasas grant, which were the subject of the archive documents which appear in this Record between pages 238 and 239, were the original papers which were pre-

served in the archives, and that by the "original" papers he meant and intended the expediente and not the testimonio, which is the second.

And yet counsel for the Government indulge themselves with a statement, on page 26 of their Brief, that the testimony of the witness Tapia established the fact that the title papers which he examined in the year 1857, and which were the subject of the documentary evidence so often hereinbefore referred to, was the titulo of 1844, which is now in evidence in this case, and the original of which is now before this Court.

I have felt justified in making the long quotation, showing the mistakes of the interpreter with other witnesses, for the reason that it was impossible for me to know exactly what idea was conveyed to the mind of Tapia by the question put to him by the interpreter, to which he made the answer, "If I am not mistaken, that is the same." The Record shows at page 45 that the witness then had in his hand the titulo of 1844, and that the following question was put to him: "Look at this paper and see if that is the paper that was sent to you in 1857. Look it all through and see if you do not recognize that. Look at the last part particularly."

And to this question his answer was as just stated. *It was immediately after this and upon a redirect examination that the witness gave the testimony just hereinbefore quoted, in which he stated that the title papers which were given to him in* 1857 *were the original expedientes which are kept in the archives.*

On account of the difficulty of examining a witness through an interpreter and on account of the age of this witness and his statement that he had almost forgotten how to read and write, it seems to me only fair that this Court should accept his answer, "If I am not mistaken, that is the same one," as being a direct statement that the original expediente which he examined and which

was in the archives in 1857 was the expediente of the grant which was made in 1844, and not the expediente of the grant which was made in 1807. By giving it this interpretation the testimony is in no way inconsistent with all the balance of his testimony, and I submit that my redirect examination of the witness and his replies thereto entirely destroy the construction of his answer ("If I am not mistaken, that is the same one") which the counsel for the Government now attempt to place upon it.

The witness distinctly stated the true difference between an expediente and a titulo, although my question expressly directed him to confine his answer to "yes" or "no," and he then repeated that it was the original expediente which he had in his hands.

The record shows that all the parties who had signed said documents, except Eufemio Tapia, died before the date of said trial of this case in the Court of Private Land Claims.

The documents are sufficient in themselves to establish the fact that the expediente of this grant existed in the archives of Mexico as late as the 10th day of February, 1857, but we established our good faith by bringing before the Court every living witness who might be expected to have actual knowledge of any of the facts or by accounting for his absence.

ANALYSIS OF DOCUMENTS ESTABLISHING RECORD.

Said documents show that the expedientes of the Tumacacori and Calabasas land grant were removed from the archives of Mexico in the month of February, in the year 1857, by an examiner of the Departmental Treasury, who was appointed for that purpose by Governor Pesquira.

The power of the Governor to appoint an inspector of the office of the Treasurer General and to suspend the Treasurer General is fully supported by article 12 of the law of September 21, 1824, which reads as follows, to wit:

"The General Government will invest the Governor of the State with powers so that in case of the death of the commissary or in other cases that may not admit of delay they may take the steps necessary to secure the money, documents, etc., and to place them in the charge of a person in whom the Governor has confidence, and even to make investigations of important acts for the discovery of valuables, giving an account without delay to the Government."

This law was still in force as not inconsistent with any other law on the same subject; but the power is expressly continued in force by the law of December 7, 1837, which gives the Governor power to suspend treasury officials, and to appoint inspectors as well as to personally inspect the Treasury Department.

Document No. 1 states that in order to conclude a report which the Governor asks from the Treasurer General's office it is necessary for the inspector to have before him the expedientes of the ranches of Tumacacori, Calabasas, Cocospera, and San Pedro d'Arivaca, which documents he hopes the Acting Treasurer will favor him with, and that they will be returned, and that said document, which is signed by both the Inspector Guitterrez and by Tapia, shall constitute a receipt for said expedientes. (See Record, p. 240.)

It will be noticed that it is the *expedientes* which are asked for and *not* the *titulos*. The reply is as follows, to wit:

" *I have the honor of remitting to you*, as per your request of the 8th inst., and for the purpose of concluding a report which His Excellency the Governor of State asks of you, *four expedientes of the measurements of the ranches La Cacita, Calabasas, Tumacacori, and San Pedro d'Arivaca*, not doing the same with that of Cocospera on account of having found in the archives of this office only the evidence of title in due form issued in favor of the natives of said place, as can be deduced from copy which I transmit herewith to you, which evidence was found in a book of Toma de Razon of lands which in 1833 was kept by the Treasurer General of the State."

I have quoted this translation in full from page 240 of the Record, partly for the reason that an important error has been made in the printed record of the translation of said document No. 2. On line 3 of said translation the word "for" appears, so that the document seems to state "for expedientes of the measurements" instead of stating "four expedientes of the measurements." In the original document No. 2 the words are "quatro expedientes."

See Photographic Copy No. 2 between pages 238 and 239 of Record.

It will be noticed that this document states that the Acting Treasurer has transmitted "*four expedientes*" and *not four titulos* or any other number of *titulos*. The care with which the person writing the document states that he only sends a copy of a Toma de Razon entry as to the Cocospera grant justifies us in presuming, if such a presumption is necessary in the face of the express language of this document, that if the "titulo" instead of "expediente" of this grant had been transmitted he would have expressly stated that fact. His office was being examined by an inspector, and he was about to be removed on account of his defective bond, and he would have been more than ordinarily careful to protect himself when letting documents out of his possession at this critical period of his official life.

Another significant fact in this document is the recital that "*four*" expedientes have been transmitted. In naming the four, we find only the following, to wit: One, La Cacita; two, San Pedro d'Arivaca, and, three, Tumacacori Calabasas. It is a well-known fact, as is shown by the title papers of the 1807 grant, that the Tumacacori and Calabasas is one and the same grant, and that in 1807 but one expediente was made of it. The reference in the Sonoita grant is to the Mission of Tumacacori and Calabasas and not to the Missions of Tumacacori and of Calabasas.

On page 315 of Record we find a copy of the Toma de Razon entry of the Nogales grant, in which is the following language:

"Between the north boundaries of the rancho of La Cacita and those west of the Mission of Tumacacori and Calabasas."

This Toma de Razon entry was made on January 7, 1843, and not in the year 1845, as erroneously appears in the record. As late, therefore, as the date just mentioned the land comprised within this grant was referred to as the "Mission of Tumacacori and Calabasas" and not as the Missions of Tumacacori and of Calabasas.

Hence, it seems very clear to the writer that the transmitter of these expedientes had sent one expediente of the La Cacita ranch and one expediente of the San Pedro d'Arivaca ranch and two expedientes of the ranch of Tumacacori and Calabasas, making a total of *four expedientes.*

In no other way can we account for the fact that there were four expedientes.

We know that the archives ought to have contained the expediente of this grant which was made in the year 1807, and we also know that the archives ought to have contained the expediente of this grant which was made in the year 1814, and that therefore *two* expedientes of the Tumacacori and Calabasas ranch ought to have been in said archives. From the document under discussion it would seem plain that both those expedientes were in the archives and were transmitted to Guitterrez and Tapia on the 10th day of February, 1857.

Document No. 4 is as follows, to wit (p. 241):

"Don Toribio takes with him the following expedientes for which Don Eufemio Tapia must give receipt:
"Cacita, Tumacacori y Calabasas.
"Calabasas.
"Tumacacori.
"Aribay."

It will be noticed that in this document the ranch of Tumacacori and Calabasas is repeated twice. For what reason it is hard to divine, unless there were actually two expedientes of this grant of Tumacacori and Calabasas, and *by no other process of reasoning does this last document, No. 4, show less than five or more than three expedientes.*

In other words, in order to satisfy the statement contained in document No. 2, that "*four expedientes of the measurements of the Ranches La Cacita, Calabasas, Tumacacori, and San Pedro d'Arivaca*" were remitted, we must inevitably adopt the conclusion that there were two expedientes remitted of the ranch of Tumacacori and Calabasas, to wit, the one of 1807 and the subsequent one of 1844, as the only rational solution thereof.

EFFECT OF DOCUMENTARY EVIDENCE.

Counsel for the Government admit, at page 63 of their brief, that this correspondence of 1857 "*may have some tendency to show the existence in the archives at that time of the expedientes in the Tumacacori and Calabasas grant;*" but they attempt to weaken the effect of this admission by adding that, in their opinion, "it is not sufficient to meet the requirements of the sixth article of the treaty of Mesilla.

MOTIVE OF GOVERNOR PESQUIERA IN CAUSING REPORT TO BE MADE ON THIS GRANT IN 1857.

We have not only shown, therefore, that this grant was duly recorded in the archives of Mexico by that character of evidence which this Court held would be sufficient to establish the existence of a judicial record in case the same was lost or destroyed, to wit, by "something officially connected with it" and "which shows that it had been officially made," but the testimony in this case also throws light upon the object and purpose of Governor Pesquiera in causing an

examination of the expediente of this grant early in the month of February, 1857.

The witness Rusk Green testifies, at page 88 of the Record, that Mexican troops were still at Tubac, only about one mile from the home ranch house of the Tumacacori grant, in November, 1854, when he reached there; that Pesquiera came to Tucson and lifted the Mexican troops from that post in March, 1856; that he came there and paid off the troops, and had to pay them off to get them out of the country, as they refused to go otherwise; that he, Green, was in Tucson at the time, selling goods, and that the troops left there in March, 1856, and that Pesquiera lifted the troops from Tubac as he went by.

Mr. Carlos Velasco testifies, at page 50 of the Record, that Gandara, the original owner of this grant, headed a revolution in Sonora in April, 1856, and succeeded in establishing himself as governor; that Pesquiera at that time was in the frontier; that Pesquiera was inspector of the military colonies at the time; that Pesquiera raised troops in the frontier and marched on Ures, and that in beginning of August, 1856, Pesquiera laid siege to Ures, the capital of Sonora, and finally entered the town.

History tells us that Pesquiera took office as Governor on August 19, 1856, on which day he entered Ures, the capital of Sonora.

This is also shown by the documents already in evidence and from the testimony of Tapia, who was appointed by Pesquiera as provisional treasurer in the month of February, 1857, as appears from his testimony beginning at page 42 of the Record.

At page 51 of the Record Velasco testifies that the relations between Pesquiera and Gandara was very unfriendly in 1856 and 1857, and this can hardly be doubted from the facts already in evidence that Pesquiera had driven Gandara out of Sonora in the month of July or August, 1856.

Velasco proceeds to testify, at page 51 of the Record, that

he had a conversation with Pesquiera in the year 1872, and that, in recalling the events of former years, Pesquiera said—

"That he was very sorry that he did not confiscate *all* of the property of Gandara; that he had issued out a decree (to that effect); that he had not confiscated that on account of some consideration, but that he did wrong in not confiscating that, because if he had done so Gandara would never again have made another movement."

Velasco proceeds to state that he personally knows that Pesquiera actually did take possession of the haciendas of Gandara in Sonora in the year 1856; that he took possession of them entire to place in them the forces he had under him and their horses, and that he made use of everything that was in the haciendas, such as horses and wagons, and that he sold all the grain that he could, and that "everything that he could he sold" (p. 51).

The witness Jesus Nunez testifies, at pages 77, 78, and 79 of the Record, that he was a soldier in the Mexican army under Pesquiera, and that he was at the rancho of Tumacacori and Calabasas with Pesquiera, who was the commanding general, and that Pesquiera took the sheep which were there belonging to Gandara and drove them to Imurez (which is a short distance across the line, in Mexico), and gave them to his soldiers to eat.

The exact date upon which this occurred is not stated by Nunez, but it was undoubtedly at the time mentioned by Rusk Green, in 1856, when Pesquiera lifted the troops from Tubac and was on his way to Ures to drive Gandara out of Sonora, and only a few months before Pesquiera ordered the examination of the expediente of the Tumacacori and Calabasas grant and at the time he was confiscating all of the property of Gandara in Mexico.

Just before starting the revolution in April, 1856, by which he became Governor, Gandara had secured from Aguilar a deed to this grant, which deed was publicly ex-

ecuted at Guaymas before the Judge of the Second Instant of that district, and it had been a matter of notoriety during the years 1851, 1852, 1853, 1854, 1855, and 1856, that Gandara was the real owner of this grant, and that he was openly and notoriously in possession of the same, and had thirty or forty families located upon it, as is shown by the testimony of the witnesses, Teodora de Troil, William de Troil, Peter R. Brady, Jesus Marie Elias, Charles D. Poston, Jesus Nunez, Concepcion Elias, Rusk Green, Peter Kitchen, Fritz Contzen, Antonio Ramirez, Jose Marie Peralta, and Jose Rodriquez, at pages 54 to 98 of the record.

At the time the proceedings took place, therefore, which are described in the documentary evidence of the record of this grant which we have just examined, Pesquiera, the Governor of Sonora, was attempting to cripple Gandara financially so that he would not be able to return to Sonora and cause any more trouble. Pesquiera had not hesitated to seize the personal property of Gandara which was on this grant and to confiscate the same and carry it into Mexico as late as March, 1856; and we have seen that Velasco testified at page 53 of the Record that "revolutionary parties would go in, and if they were parties from the opposite side that had pending cases they would immediately go to the archives and destroy every paper."

ANALYSIS OF APPELLEE'S CRITICISMS OF RECITALS IN TITULO OF 1844.

Counsel for the Government state in their brief, at page 59, that "the grant of 1844 appears to have been executed at Guaymas, April 19, 1844, at which time there was nothing in the archives indicating the extent of the lands which had been granted in 1807 to the pueblo of Tumacacori as fundo legal and estancia, and nothing appears to be in the archives to show the fact that Ignacio Lopez executed the conveyance of 1844."

At page 63 of their brief, counsel for the Government state:

"It is also quite clear * * * that none of the documents relating to the grant to the pueblo of Tumacacori of 1807 were in the archives in April, 1844."

And at page 19 of their brief counsel for the Government say:

"By these recitals it will be seen that the officer making this sale did not have either the expediente or the titulo of the Tumacacori grant of 1807, and it does not appear that he had any information as to where they were, consequently he did not know what the boundaries were, and the only information he seems to have had was generally as to the area of the town site and the estancia. It is apparent also that at that time there was nothing in the archives by way of record of the grant of 1807 from which any definite information could be obtained by Lopez as to this alleged original grant to the pueblo of Tumacacori."

It will be seen that counsel for the Government will not even candidly acknowledge the genuineness of the grant of 1807, to wit, the existence of the Mission of Tumacacori and Calabasas, although the title papers of the Sonoita grant mention this mission, and the record evidence of that grant is certainly fully established, and although the title papers of the Nogales grant also mention this mission as late as the year 1843, and the Toma de Razon entry (the only record evidence recognized by counsel for the Government) of that grant expressly names this mission grant as bounding it on the north or west, and although Special Agent Flipper testified that he believed it to be undoubtedly genuine.

The recitals referred to by counsel for the Government as having the above-mentioned effect read as follows, to wit:

"With the understanding, also, that just as soon as the original titles of said agricultural and grazing lands are obtained they shall be aggregated to the present ones, and

THE TRANSMITTAL AND DELIVERY of said original documents are considered as made and verified from this moment in favor of said party in interest, Don Francisco Alejandro Aguilar."

The learned counsel construes these words as meaning that the *expediente* of the 1807 grant, when received, should be aggregated to the *expediente* of 1844, whereas it is plainly apparent from this recital standing alone that reference was made to the *titulo* or testimonio of said grant of 1807, for we know that "the transmittal and delivery" of the original *expediente* was never in any instance made to the party in interest.

But counsel for the Government have separated these phrases from the other parts of the sentence in which they are found, so that the meaning which is given them by the context is to some degree obscured. As found in the title papers, the words quoted can have no other meaning than those which I have just given to them. By referring to page 14 of the Government Brief we find that the titulo also contains the following recital, to wit:

"The original *expediente* remaining deposited in the archives of this Treasury as perpetual evidence, with the understanding that when the original TITLES of Tumacacori and Calabasas are obtained they shall be aggregated to the present one."

Special Agent Flipper is too good a Spanish scholar to have ever translated any words in the original Spanish document "as original title," and he is too zealous a partisan of the Government to have done so if the words were capable of being intérpreted to mean the "original expediente" instead of "the original titulo or testimonio."

In the translation of the titulo of 1844, which is contained in the Government Brief, on pages 10, 11, 12, and 13, we find the following additional recitals, upon which counsel based their argument, to wit:

" Whose areas, boundaries, monuments, and coterminous tracts are stated in the corresponding proceeding of survey executed in the year 1807 by the commission surveyor, Don Manuel de Leon, veteran ensign and late commandant of the Presidio of Tubac, *according to the information obtained in relation thereto at the instance of this Departmental Treasury*, said temporal farming and grazing lands being valued in the sum of $500, as provided in Article 2 of the aforesaid supreme decree of February 10, 1842."

Then follows the proclamation by the public prior that the Treasury Department is going to sell this land, describing the land in almost the exact general terms which are used in the expediente of 1807, and proceeding as follows, to wit:

"As appears from the information obtained at the instance of said Departmental Treasury, from which it also appears that the original titles of grants [titulo or testimonio] and confirmation of said temporalities still exists," etc.

The words titulo or testimonio contained in the brackets are my own, for it may again be said that Mr. Flipper would never translate any Spanish words as meaning "original titles" if they meant anything else than the *titulo or testimonio*, which is given to the grantee.

The effect of the foregoing recitals, therefore, is simply that said Tumacacori and Calabasas grant, which is to be sold, pertains to the department of temporalities, "according to the information obtained in relation thereto at the instance of the Departmental Treasury," and that said lands have been valued at the sum of five hundred dollars by appraising them in the manner provided for in Article 2 of the decree of February 10, 1842.

And that "the areas, monuments, and coterminous tracts" of the lands which are about to be sold by the Treasury Department "are stated in the corresponding proceedings of survey executed in the year 1807 by the commission sur-

veyor, Don Manuel de Leon," etc., "as appears from the information obtained at the instance of said Departmental Treasury."

There is nothing whatever to indicate that this information was not obtained from the expediente of said Tumacacori and Calabasas land grant, and there is nothing to indicate that said expediente was not at that time in said archives.

The recital goes on to say that "from the information obtained at the instance of said Departmental Treasury" * * * "it also appears that the original titles of grants (titulo or testimonio) and confirmation of said temporalities still exist."

The accuracy and proof of this last branch of the recital is fully demonstrated by the fact that said original titulo or testimonio is at this very time in the possession of the clerk of this Court and is open to the inspection of the justices of this Court, and its authenticity and genuineness have not been questioned by one syllable of testimony in this case.

The exact description in general terms of this grant which is contained in that notice of sale shows that the officer who prepared the notice of sale had access to either the titulo or the expediente of said 1807 grant at the time he prepared said notice of sale.

It is possible, however, that the expediente of said 1807 *grant was not in Guaymas, at the place where this sale was conducted, at the time of said sale, in April*, 1844.

In February, 1839, the capital of the Department of Sonora was at Ures, as shown by the letter of Jose Marie Mendoazo of that date to the Secretary of State of the Department of the Treasury of the Republic. We find the capital still at Ures in the year 1856, when Pesquiera drove Gandara out of the country, and the archives were likewise still at Ures upon said last-mentioned date.

The testimony of Mr. Velasco, upon pages 53 and 54 of the Record, throws a little light upon this question. He

states that he does not remember that the capital of Sonora was ever in Guaymas; that "during the time of Don Jose Aguilar it was once in Guaymas, but I don't remember whether legally or not. During the revolutions they made the capital wherever they wanted to."

Mr. Velasco testified *that he knows the civil officials were in Guaymas in* 1844 *from many documents which he had seen, and that General Ignacio Lopez (the officer who made this grant) was a Federal officer and "was the officer of the Departmental Treasury of Sonora."*

See page 53 of Record.

On page 54 *of Record Mr. Velasco testifies, upon a cross-examination made by Mr. Reynolds, that the archives of the General Government were never removed from Ures to Guaymas.*

The report of Messrs. Flipper and Tipton shows that the officer who made this grant was the Treasurer General of the Department of Sonora during the year 1843 and during at least a part of the year 1845, as well as during other periods of time.

The fact that the archives of the General Government were never removed from Ures to Guaymas, and that the departmental civil officers were conducting the affairs of the government at Guaymas in 1844, at the time this sale was made, explains the recital in this titulo of 1844 that the facts in regard to this grant which are presented in those recitals "appear from information obtained at the instance of this Departmental Treasury." The information was doubtless secured from the archives at Ures by means of written correspondence. The fact that the archives remained in Ures while the business of the Departmental Treasury was being carried on at Guaymas, in said year 1844, furnishes an additional explanation of the absence from said largest book of Toma de Razon of any notes of titles which were issued in said year 1844. If those notes or Toma de Razon entries were made upon loose sheets of paper, it is more than likely

that those loose sheets of paper never reached the archives at Ures, but were destroyed or lost during one of the frequent revolutions.

The last entry in said book of Toma de Razon for the year 1843 is signed by Lopez on December 9 of that year, and fifteen entries signed by said Lopez appear in said book of Toma de Razon for the year 1843, ranging from January 26 of that year until the date just mentioned. These are the first times the name of Lopez appears as a Treasury official in said book of Toma de Razon. The very next entry in said book of Toma de Razon after the one of December 9, 1843, is that of the Tetacombiate grant, dated February 17, 1845. The next five entries in said book are also made by said Lopez in said year 1845. (See Supplemental Report of Messrs. Flipper and Tipton.) Lopez's name does not again appear in that book until the years 1847, 1848, and 1849.

It is fair to presume, therefore, that Lopez as Treasurer General was conducting the affairs of that office at Guaymas during the whole of the year 1844, and that the archives, including said book of Toma de Razon (provided that it had been sewn together in its present condition prior to that date), were still at Ures, and remained there, and we may presume that the Treasurer General's office was returned to Ures in January or February, 1845, and Lopez again commenced to make Toma de Razon entries of grants issued by him.

But Mendoza succeeded Lopez in 1845, and in this same year Mendoza made the entry in said book of Toma de Razon of the number of pages contained in it, &c., and to my mind this furnishes additional evidence that the loose sheets were then gathered up and sewed together by Mendoza.

In the case of the *U. S. vs. Arredondo*, 6 Pet., 744, this Court, in passing upon the question of the due performance of conditions subsequent by the grantee, said:

"Great allowance must be made not only for the disordered state and prevalent confusion in the province at the time of the grant, but until the time of its occupation by the United States. Though a court of law must decide according to the legal construction of the conditions and call on a party for a strict performance thereof, a court of equity on more liberal principles will soften the rigor of law, and though the party cannot show a legal compliance with the condition, if he can do it by *cy pres* they will protect him and save him from forfeiture."

So, also, in considering the question of the record of this grant, it would seem to be the duty of this Court to take into consideration the imperfect methods adopted at that period of time in the Mexican Government for preserving any authentic record of the acts of its officers in granting lands or of the specific portion of the public domain which had thereby been alienated. It must also take into consideration the distracted state of Sonora during that period, owing to frequent revolutions, resulting in a change of the officers who had charge of the archives, and also resulting, as is shown by the testimony in this case, in the destruction of many of the records through malice or a spirit of pure vandalism; and special allowance must be made upon this question of proof that a grant had been "duly recorded," in view of that principle of natural justice which declares that a *bona fide* purchaser for a valuable consideration ought not to be made to suffer for the failure of others over whom he has no control to perform their duties.

LIST OF 1855.

On page 60 of their brief, counsel for the Government say:

"Another very significant fact appears in the absence from the archives in 1855 of the grant to the pueblo of Tumacacori, made in 1807, and the so-called grant to Aguilar of 1844, at which time a list of the expedientes was made for

the Commissioner of the National Government under the celebrated decree of Santa Ana of July 7, 1854, so often referred to and discussed before this Court."

The only knowledge I have of the list of 1855 referred to by counsel for the Government, and in which he alleges that this grant does not appear, is the reference to the same in the official report of the condition of the archives or records of the titles to land grants in Arizona and similar grants in Mexico, which has often been referred to in this brief and which was made by Special Agents Will M. Tipton and Henry O. Flipper, of the Department of Justice.

The only information contained in that report in regard to it is on pages 2 and 3. These special agents state that the list was made on July 26, 1855, by the Treasurer of the Department and forwarded to the agent of the Secretary of Public Works in the Department of Sonora on the same day; that this list is a rough draft or borrador, but is signed by the Treasurer of the Department.

The special agents then go on to state that in said list are certain Arizona grants, which they enumerate, and that certain other Arizona grants which they enumerate, including the Tumacacori and Calabasas grant, are not in that list.

We are not told where this list was found by the special agents. "In compliance with your instructions, we examined the list referred to in your letter." If this list was found in the office of the agent of the Secretary of Public Works in the Department of Sonora, we ought to be told that fact.

If it was in the Treasurer General's office and was nothing but a rough draft or borrador, what evidence is there that it was forwarded to the agent of the Secretary of Public Works on July 26, 1855, or at any other time? Where did the special agents get the information, and what was the character of the information, upon which they make this last statement? We have already referred to the reckless-

ness with which they make statements in favor of the Government, notably the one on page 101, "There is absolutely no record of this grant (the Tumacacori and Calabasas) of any kind in the archives."

Besides the documentary evidence in this case relating to the Tumacacori and Calabasas grant, of which those special agents had notice, there was the Toma de Razon entry in the Nogales grant, dated July 7, 1843, stating that the grant was "west of the Mission of Tumacacori and Calabasas in Pineria Alta and in the district of San Ygnacio," and Mr. Flipper had full knowledge of that entry. How could he say, therefore, that there was "no record of *any kind* in relation to said grant?

What weight can we give to their declarations, therefore, in relation to this list of 1855? It must be an exceedingly crude and rough document to receive such a description from Mr. Flipper when it seems to be favorable in its contents to the side of the Government. If found in the Treasurer General's office what evidence is there that it is the completed list which was finally sent to said agent, if such a list was ever sent?

The best evidence of what the list contains and of what it does not contain would be the list itself. It is not a record which was required to be kept in the archives, and although made by an official, it should have been put in evidence, and we should have had an opportunity to examine it and inquire into its history before it is used against us.

Fortunately we are not bound by any report made by Mr Flipper against us without our having had the opportunity to cross-examine him, whatever weight this Court may give his statements as admissions against the Government.

In the case of *U. S. vs. Auguisola*, 1 Wall., 357, this Court said:

"*The objection that the grant is fraudulent and void rests mainly upon the allegation of counsel that it is not mentioned in the list of expedientes known as Jimeno's Index. We say,*

upon the allegation of counsel, for Jimeno's Index is not in evidence, nor was any proof offered of its contents, and under the circumstances of this case, if the fact were as alleged, it would not be entitled to much weight."

The facts in that case are substantially similar to the facts in the case at bar, and the comment of this Court just quoted applies with full force to this list of 1855.

If counsel for the Government had put this list in evidence, or even if it had been fully set forth in said report of Messrs. Flipper and Tipton, we might compare it with the lists of grants which are in the book of Toma de Razon and thus discover how many and what grants were set forth by the Treasurer General of the Department of Sonora in the year 1855 as being grants to which titles had been issued.

It would be interesting to know whether the Treasurer General of Sonora at that date complied with the request of the agent of the Secretary of Public Works for "a list of all expedientes of titles to land issued or pending from September, 1821, to date, by separating those upon which titles had been issued from those which were pending, and whether he made up a list for this first class by simply enumerating those which are found in the two books of Toma de Razon or by adopting the method pursued by Mr. Rochin, to wit, by examining each expediente to discover whether payment for the land had been made or title had been issued.

In the case of *U. S. vs. Auguisola*, 1 Wall., 358, this Court said:

"The United States have never sought, by their legislation, to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo, to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages, and

customs of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which they could have claimed from the Government they superseded."

LIST OF 1855 (CONTINUED).

The unreliability of this list of 1855 as proof that record of a grant did not exist in the archives of Mexico at the date said list was prepared is further shown by the fact that Special Agents Flipper and Tipton state at page 3 of their Report that among the Arizona grants which are not enumerated in said list is the "Aribac" grant.

At page 100 of their Report said special agents say:

"162. Aribac. (Arizona.)

"There is absolutely nothing in the archives concerning this grant except the entry in the book of Toma de Razon under the year 1833, on page 1 of leaf 13, as follows:

"'On the 12th of July there was delivered to Captain Don Ignacio Elias Gonzalez the grant title, issued on the 2nd of July of the current year, for two sitios of land for raising cattle and horses, which is comprised in the place called Aribac, situate in the jurisdiction of the Upper Pima country, in favor of citizens Tomas and Ignacio Ortiz, residents of the Presidio of Tubac.

MILLA.'"

As the fact that title had been issued on this grant was specifically set forth in said book of Toma de Razon, no reason exists to excuse the fact that it was not enumerated in said list of 1855, as some of the other Arizona grants were enumerated in that list, and consequently it was not omitted because of the fact that it was located outside of the then existing boundaries of Mexico.

Not only did this Toma de Razon entry of the Aribac grant exist in the archives at the time said list of 1855 was made, but the expediente of said Aribac grant was like wise in said archives at that time, as this is one of the grants the expedientes of which were taken from the archives in February, 1857, by the order of Governor Pisquera, as appears from the photographic copies of documents (Record, pp. 238, 239. See translations (Record, pp. 240, 241).

The "San Pedro de Arivaca" grant, which is mentioned in document No. 2, is the same grant which is referred to in document No. 4 as the "Aribay," and is referred to in the translation of said document No. 4 as the "Aribac."

The letters "b" and "v" seem to be used interchangeably in all these Spanish documents, and in mentioning a grant by its name in any informal document it also seems to be customary to drop all but the last part of the name.

This is a curious fact, that all four of the grants whose expedientes were removed from the archives by the order of Pisquera, as shown by said document No. 4, are located close together. The Casita grant adjoins the Nogales grant, which has been before this Court, and which itself adjoins the Tumacacori and Calabasas grant. The Aribac grant is in the same neighborhood.

LOCATION.

THIS GRANT WAS LOCATED WITHIN MEANING OF GADSDEN TREATY.

Counsel for the Government contend in their brief that this grant is void for the reason that it was never "located" within the meaning of said Gadsden Treaty.

In the case of *Hornsby vs. U. S.*, 10 Wall., 233, Mr. Justice Field says:

"As we have had occasion to observe in several instances, grants of the public domain of Mexico *made by Governors of the Department of California* were of three kinds—1, grants

by specific boundaries, where the donee was entitled to the entire tract prescribed; 2, grants by quantity, as one or more leagues situated at some designated place or within a larger tract described by outboundaries, where the donee was entitled out of the general tract only to the quantity specified; and, 3, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession or other competent evidence.

"The greater number of the grants which have come before this Court for examination have belonged to the second class. They have usually designated the land ceded by the general name of the valley or locality where situated, with a clause annexed that the concession was limited to the specific quantity mentioned, and that the Magistrate of the Vicinage, of whom possession was to be solicited, should cause the same to be surveyed, and that any surplus existing should be reserved for the use of the nation."

We see from an examination of the California cases that these grants of the second class were in almost every instance gratuitous donations. We have also seen that in some instances the grantee pocketed his title paper and never attempted to take possession of his grant or to have the same located until many years after, when the land had become valuable by an influx of population and other property rights had grown up in connection with it. In many instances it is apparent that after securing the grant the original grantee abandoned the idea of expending any money to take possession of the same or to comply with the conditions specified in the title papers.

It was to obviate this mischief that the word "located" was inserted in the English version of the Gadsden Treaty; but we shall presently see that this word "located" or its equivalent was omitted from the Spanish version of that treaty in the original document.

It seems quite clear to my mind that this omission was partly due to the fact that no necessity for its insertion actually existed, for the reason that no grants of this second

class had ever been made by the Mexican Government within the boundaries of the lands then being ceded.

The testimony of Mr. Bonillas in this case and the letter of Jose Maria Mendoza, as Superior Chief of the Treasurer, to the Secretary of the Department of the Treasury, which has before been quoted in part, and the report of Special Agents Flipper and Tipton, as well as the fact that in no single-grant case which is now before this Court from Arizona or which has been tried before the Court of Private Land Claims has a single grant of this class been named, pointed out, or shown to have existed within said section of country, and the fact that no law of the State of the West or of the State of Sonora ever authorized a grant of this class to be made, all seem to conclusively establish the fact that no such grant ever was made by the Government of Mexico or by any State or Department having power to make grants within said section of country.

The method of making these grants by quantity within specified outboundaries differed radically from the method of making grants by specific boundaries which prevailed in Sonora during the entire period of its history down to the date of the Gadsden Treaty.

In Sonora all the grants of land were executed contracts of purchase instead of voluntary grants. In each instance the land, after certain preliminary proceedings, including a definite survey in every instance, was put up at auction and sold to the highest bidder.

Hence no grant was ever made without its having been "located" prior to the sale.

Webster defines "located" as follows: "To select or determine the bounds or place of; as, to locate a tract of land;" and "location," he says, in its judicial acceptation is "the marking out of the boundaries or identifying the place or site of a piece of land according to the description given in an entry, plan, map, and the like."

The Century Dictionary defines "to locate" as follows:

"To fix the place of; to determine the situation or limits of; as, to locate the site of a building; to locate a tract of public land by surveying it and defining its boundaries; to locate a land claim; to locate (lay out) the line of a railroad."

The grant of these lands under the titulo of 1807 was unquestionably a grant of the first class, to wit: One by specific boundaries, where the grantee was entitled to the entire tract described.

The grant of these lands by the titulo of 1844 was, it seems to me, just as unquestionably a grant of said first class. It is an ordinary rule of construction of deeds that whatever can be made certain by the reference contained in the deed shall be treated as already certain. The titulo of 1844 expressly refers to the survey which was made by Leon in 1807 and to the testimony of the witnesses contained in the titulo of 1807 in regard to other boundary points. Hence the titulo of 1844 must be read as if the titulo of 1807 had already been aggregated to and made a part of it in compliance with the recital contained in said titulo of 1844.

Said titulo of 1844 combines the qualities of both the first and the third classes of grants; as it is also a grant of a tract of land by a well-known designation or name, to wit, the Tumacacori and Calabasas Mission, and the settlement and possession of said tract of land to the boundaries as described in said titulo of 1807 was established in the trial of this case by competent evidence.

Hence it seems indisputable that this grant was "located," to wit, that its boundaries were fixed and determined, and that it was the grant of a specific portion of the public domain which had already been fixed and determined and marked and defined, so as to be separate and distinct and easily identified from other portions of the public domain at the time it was sold to Aguilar in 1844.

The Spanish version of the treaty of Mesilla, however, does not contain the word "located" or any equivalent expression, I am advised.

Hon. Y. Sepulvida, Secretary of Legation at Mexico, and Hon. Luis Mendez, President of the Mexican Academy of Legislation and Jurisprudence, in their letter from which I have before quoted, assure us of this fact.

In the case of *U. S. vs. Arredondo*, 6 Peters, 740, this Court held that the Spanish version of the treaty must prevail in construing the validity of grant titles under it. This Court said:

"The rules of law are too clear to be mistaken and too imperative to be disregarded by this Court. We must be governed by the clearly expressed and manifest intention of the grantor and not the grantee in private, *a fortiori*, in public grants."

APPELLANT HAS A GOOD AND VALID TITLE TO THIS GRANT UNDER THE TITULO OF 1807 ALONE.

We have seen that the original grantees under the titulo of 1807 were still in possession of these lands as late as the year 1835, when the witness Jesus Maria Elias, who was born at Tubac, left Calabasas, at the age of seven years, to go to Tucson to reside. (R., p. 61.)

We have also seen that a clergyman appeared at the survey of the Nogales grant in 1841 to defend the boundaries of this mission, and (Record, p. 284) we find that on March 31, 1856, Manuel Maria Gandara, who had taken possession of these lands in 1851 and had occupied them continuously thereafter until said first-named date, had in his possession said original titulo of 1807.

The fact that he had been openly and notoriously in possession of these lands for more than five years, coupled with the possession of this original title paper, is sufficient evidence at this late day, and long after his death, when

lands are in hands of *bona fide* purchasers for value, to warrant the presumption that these lands had been conveyed to him for a good consideration prior to September 1, 1853, by the parties who then owned said lands under said titulo of 1807.

Under the laws of Mexico down to the date of the Gadsden Treaty, the mere delivery of the title papers or the placing of the purchaser in possession of the property was a sufficient transfer of the dominion of the seller over the real estate sold.

In a very valuable brief prepared by Mr. Byron Waters and on file in the case of *Hearst vs. U. S.*, now pending before the Court of Private Land Claims, I find the following statement made in an opinion written by Hon. Y. Sepuelvida, Secretary of Legation at Mexico (formerly one of the Justices of the Supreme Court of California), and Hon. Luis Mendez, President of the Mexican Academy of Legislation and Jurisprudence, to wit:

"The transfer or delivery of the thing sold might be a material delivery or a symbolical one. The first consisted in the seller placing the purchaser, in fact or materially, in possession of the thing; the second was affected by the mere delivery of the title to the property. And on this symbolical delivery there is in the old Spanish codes, which were in force in 1853, a most interesting law, which we will copy. Law VIII, title 30, partida 3d (Code of the Siete Partidas), says:

"'DANDO ALGUN OME HERADAMIENTO O OTRA COSA QUALQUIER APODERANDOLE DE LAS CARTAS POR QUE LA EL ONO, O FAZIENDO OTRA DE NUEVO, E DANDOGELA, GANALLA POSSESSION MAGUER NON LE APODERE DE LA COSA DADA CORPORAIMENTE.'

"(Translation:) 'If any gives a hereditament or any other thing by giving the title papers by which he holds it, or making a new one and giving it, he acquires the greatest possession, although he does not give corporal possession.'"

On this point the official circular issued by the Minister of the Interior of Mexico on May 25, 1838, and approved by

the President, found on pages 1021, 1022, 1st vol., *Galvan's Coleccion de leyes y decretos*, and also on page 557, 3d vol., *Comp. Laws of Mexico*, seems absolutely conclusive, as follows, to wit:

"It must be principally noted that there are in force all such laws as are not openly inconsistent with the prevailing system, and unless they are found to have been expressly repealed by any other subsequent disposition this rule also holding good in regard to those laws which were decreed (passed) in the very remote epochs and under the different forms of government which the nation has had, and that therefore the courts and other authorities daily transact their various duties under the existence of the laws of the Cortes of Spain or the laws of Partidas and Compilation as long as this disposition is not repugnant, more or less, to the form of government in which they were sanctioned."

It must be presumed that said Gandara came honestly by this titulo which we find in his possession as early as March, 1856, as the law never presumes crime, and his possession of the same in any other capacity than that of being its owner is inconsistent with his open claim of title under his notorious possession of the lands for such a long period of time prior to that date.

If the titulo of 1844 did not convey title to Gandara or his trustee, Aguilar, it follows that the grantees under the titulo of 1807 or their successors in interest were still the owners of these lands and could resume possession of the same at any time prior to the lands being denounced by a prospective purchaser and sold by the Government. As the lands had not been denounced prior to the Gadsden Treaty, it is clear that this Government acquired no title to the same by virtue of said treaty as against the owners of said lands under said titulo of 1807.

No Toma de Razon book for the year 1807 exists in the archives of Mexico, and besides the evidence of the fact that the expediente of 1807 was still in the archives at the

date fixed by the Gadsden Treaty, the Toma de Razon entry of the Nogales grant, and the expediente of said grant show that the Mission of Tumacacori and Calabasas did exist as late as the year 1841, and the expediente of the Sonoita grant likewise shows that it did exist as early as the year 1820. See Toma de Razon entry of Nogales grant (Record, p. 315), where it erroneously appears that the entry was made January 7, 1845, instead of January 7, 1843, the true date.

POINT III.

Can the grant be located upon the earth's surface from the calls of the title papers or by the testimony of witnesses as a well-known place?

PROPER METHOD OF SURVEYING A MEXICAN GRANT.

The only witness on the part of the Government, as has already been stated, was Henry O. Flipper, a special agent of the Department of Justice, who admits (R., p. 205) that he claims to own 160 acres of the best land upon this grant. He further admits, upon cross-examination (R., pp. 226, 227), that he made a report upon this Tumacacori and Calabasas grant in September, 1890, for a lawyer residing in Washington, named "Judge Le Barnes," who had been employed by the squatters on the grant; that in this report said Flipper stated under oath that he believed that this grant was genuine, and that the only way you could defeat it was by showing indefiniteness in the boundaries, and that it would be necessary to depend on the indefiniteness of the description of the survey and the consequent impossibility of locating the grant on the earth's surface.

Said Flipper further states in said sworn report:

"I am of the opinion that the title is genuine, notwithstanding it is obscure, indefinite, and defective. I arrive at this conclusion the more readily because I know that all or

nearly all the titles issued by the Spanish authorities which I have examined are equally obscure, indefinite, and defective." (R., p. 227.)

Upon cross-examination (R., pp. 226, 227) he admits that he still believes said grant to be genuine, and that he still endorses the facts stated in the lines just quoted.

Later on we shall see that this witness under cross-examination identifies and acknowledges the correct location of every single monument called for in the title papers of this grant. We shall see that his testimony upon cross-examination is in some instances diametrically opposed to the testimony given by him upon his direct examination. The rigor of cross-examination compels him to make flat contradictions and admissions.

Mr. Flipper came upon the stand as an expert, stating that he had had twelve years' experience in surveying land grants in Mexico (R., p. 206). He admitted under cross-examination that these twelve years of experience could all be boiled down into a period of only three or four months' actual service in the field as a surveyor, and that the remainder of the time was expended by him in doing office work, in the translation of title papers for a surveyor who did not understand a word of the Spanish language, and who attempted to locate these grants in Sonora from the translations which were made by said Flipper (R., p. 214.)

Mr. Flipper admitted that he had examined the title papers of more than 2,000 Mexican grants, being all the grants in nineteen counties of the State of Chihuahua, and that all or nearly all of them were equally as obscure, indefinite, and defective as the title papers of this grant. (R., pp. 207, 227.)

Mr. Flipper also admitted that in running surveys in Mexico it was very rarely that either the course or the distance called for in the title papers agreed with the actual course or distance upon the ground. (R., p. 213.)

He testified that he had assisted a Mr. Glenn in surveying about 20 grants which were designated upon a map produced by one of our witnesses, Mr. Ignacio Bonillas, and that three or four months' service in the field as a surveyor was mostly expended in making these particular surveys.

It appears that Mr. Bonillas had afterwards surveyed all of these grants on account of protests on the part of the owners of them, growing out of the defective surveys which had previously been made by said Flipper and his associate Glenn; and Mr. Bonillas produced in court the original field-notes of all of the surveys made by him within said lot 4, and likewise a map of the surveys which had been made by said Flipper and Glenn within said lot 4.

In testing the credibility of said witness, Flipper, as well as his knowledge as an expert in surveying land grants, I pressed him to state a single monument of a single grant in all of the twenty or more grants which were included in said lot 4, and which he testified he had assisted in surveying; but his memory completely failed him, and he was not able to state a single monument to which he had gone in all of those grants. It can hardly be doubted but that this failure on the part of the witness was due entirely to the fact that those field-notes which had been made by Mr. Bonillas were on hand with which to cross-examine him as to his knowledge in regard to such a monument. (R., p. 215.)

The moment he was asked to state any grant which he had ever surveyed outside of lot 4 his memory returned to him and was as bright and as clear as the noonday sun. He immediately gave the name of a grant which he felt positive Mr. Bonillas had never surveyed, and he could distinctly remember the calls, courses, distances, and descriptions of each and every monument it contained, although this grant was surveyed by him only a short time after he assisted in making the surveys of said grants in lot No. 4.

The principal witness upon the question of the location

of the boundary of this grant on the part of the appellant is Mr. Ignacio Bonillas.

Mr. Bonillas was born in the District of Magdalena, in the State of Sonora, Mexico, and is still a citizen of that country. He was educated in his native town up to the time he was twelve years old, and then went to Tucson, where he attended the public schools. He taught in the public schools of Tucson for six years while preparing himself to attend college in the East. He graduated from the Massachusetts Institute of Technology, in the city of Boston, and took what is called the summer course in the University of Harvard in addition. He graduated as a mining engineer and surveyor and has been actively engaged in making surveys of land grants, both in Sonora and Arizona, since the year 1883. (R., pp. 102, 103.)

He has held many positions of honor and trust in Sonora, and was mining inspector of the district of Magdalena and mayor of the city of Magdalena for two terms, and was afterwards prefect of the district of Magdalena for three years, and was the mining deputation for the same district, and when the mining deputations were abolished he was appointed by the President of the Republic as the mining agent for the district of Magdalena, and he also held the appointment for the State government as the official appraiser of mining and milling machinery and an appointment from the minister of public works as agent of commerce and agriculture, besides holding other small positions.

Mr. Bonillas testified that he had been studying Spanish all his life, and his testimony, as it appears in the record, demonstrates that he is a cultured gentleman of superior ability and intelligence. Both the substance of his testimony and the manner of his testifying are in marked contrast to that of the special agent from the Department of Justice, who was the only witness on the part of the Government.

Mr. Bonillas stated that since the year 1883 he has sur-

veyed about one hundred private land claims within the borders of the present State of Sonora, and that each and all of his surveys have been approved and accepted by the Government. (R., p. 104.)

Unlike Mr. Flipper, he produced upon the witness stand the original field-notes and maps and each and every grant that was ever surveyed by him, and invited an attack upon the correctness of the same by the experts for the Government, including the Hon. Matt G. Reynolds, who is himself an educated surveyor.

Mr. Bonillas frankly stated at the beginning of his direct examination that the method pursued by him in surveying Mexican land grants was, to use his own language, as follows, to wit:

"When I first commenced to make land-grant surveys I did like almost all engineers did; I wanted to follow exactly the calls of the title papers by trying to find the monuments by courses and distances given in the field survey. I found that that did not work at all and I was losing time, and I lost a great deal of time that way, so I afterwards tried" (interrupted). * * * "I afterwards found the best way to make these surveys, not to lose time, but to save work, was to get people who were well informed and well acquainted with the topographical features of the country where the land grants were located, and, as in the documents of the titles of these grants they are generally places named that are well known, I would try to inform myself from people who were perfectly familiar with the localities to ascertain where these places were and so ascertain where the monuments and boundaries called for were." * * *

"Perhaps in a thousand or more cases where I have had to investigate the courses and distance of lines I have found five or ten that agreed with the calls of the title papers in courses or distances, and all the balance did not agree." * * *

"The quantity of land that was called for in the title papers, as compared with the actual quantity as shown by these surveys, varied very much. In all my experience in surveying land grants I know but one or two cases where there was a smaller area than the title called for. The gen-

eral cases—a great majority, I might say—there were great excesses of land inside of the monuments over the areas called for in the title papers. I will give you some instances from my books if you desire." (R., pp. 104–'5.)

Mr. Bonillas then produced his original field-notes of the Quitaca land grant, and testified that the title calls for about thirteen thousand acres, and that he found about thirty-four thousand acres inside of the monuments; that the monuments are very well known, very well established, and that he found there was an excess of 21,670 acres in said grant, and that the government of Mexico acknowledged the title and issued a new title for the excess land that was inside of the monuments.

As to the courses, Mr. Bonillas stated that the center of the Quitaca land grant is established at the old ruins of Quitaca, which is a very well-known place in the valley of Quitaca. The title says then run north one hundred and twenty-four cords to the north center monument. Mr. Bonillas found that the course was north 14 degrees and 23 minutes west instead of north, and that instead of being 17,037 feet, the distance called for, it was 31,730 feet. To the south they say then run along the valley, along the road; they called that south. Mr. Bonillas found that course to be to the center from south center marked south 37 degrees 57 minutes, that much out of bearing. They called for 150 cords, or 20,625 feet, but he found there 26,268 feet—not a great difference.

The east center monument was established in a very well-known place and is itself a very well-known monument. It is said to be 15 cords to the east, and the title is so clear that it tells you how to go to the monument. You follow a ridge from the center monument and go to the center of the ridge, and there is the east center monument.

Mr. Bonillas says:

"I followed those directions, and instead of 2,074 feet, which the title calls for, I found the monument 22,077 feet.

The course is said to be east, and I found it north 36 degrees 39 minutes east." (R., p. 105.)

Mr. Bonillas next produced his original field-notes of the Alamo de Sevilla grant. This grant called for four sitios, or about 17,354 acres. Mr. Bonillas found that this grant contained considerable more that 100,000 acres. The center monument was very well known, being on the highway. The north center monument was said to be two leagues, or 27,480 feet, from the center, and he found it to be 65,034 feet from the center. (R., p. 106.)

Mr. Bonillas next produced his original field-notes of the Cinega de Heredia grant. The title calls for 17,207 acres, and he found within the monuments 99,322 acres, or an excess of 82,315 acres. (See Record, pages 105 and 106.)

In explanation of the variation which he found in these surveys, Mr. Bonillas stated:

"The explanation is they never used the proper instruments for making any surveys, and in fact they never took the great pains in making the surveys. The land was not worth much and anybody could get any land they wanted, and in making the survey the people who made the surveys were people who were not competent at all to make surveys, as a general thing, and they would take the topographical features of the country and write a description of what they did or intended to do. For instance, if a valley run northeast and southwest, they would establish a center point for a starting point, and to the north or northwest they would call that north, and the opposite direction, following the valley, they would call south, and towards the right hand, at about right angles to the course of the valley, they would call east, and in an opposite direction west, and as in the mesa Quitaca to the east the land was very good and they take much of it, and in this case they went to the foot of Cananea Mountains to establish the east center monument, and yet they say only 15 cords. On the other side it is not so good—it is not good at all—and they go to the Puesta of the Quitaca, which is a point very well known on the trail, and right on top of the puesta they establish a monument only about five

or six hundred feet, and yet they say 15 cords also. In one case they took all the good ground on that side, and on the other side, where it was not good, they took just what they wanted." (R., p. 106.)

Speaking of a grant, this Court, in *Billings vs. U. S.*, 2 Wall. 449, said:

"Perhaps the province of California at that time could not furnish a man capable of making an actual survey."

Counsel for the Government have criticized Mr. Bonillas very severely for his survey of this grant; but this frank statement on the part of Mr. Bonillas is a complete answer to all these criticisms.

At pages 83–87 of the official report of Special Agents Tipton and Flipper on the condition of the archives or records of the titles to land grants in Arizona and similar grants in Mexico we find an official letter from José Marie Mendosa, as the Supreme Chief of the Treasury of the Department of Sonora, dated February 23, 1839, and addressed to the Secretary of State and of the Department of the Treasury of the Republic.

This letter begins as follows, to wit:

"MOST EXCELLENT SIR: One of the sources of public revenue in this department is that from the compensation and grant of lands for breeding cattle and horses, and is that which from the time of the extinguished intendancies of the special government up to the present has been and continues to be extremely enormous and laborious because of the innumerable registries made by breeders of the immense tracts of public lands which this department has, because of the large number of grantees who appropriate considerable excesses of sitios which are wanted by breeders who need them and defended by them who are in possession of them, and said excesses arising from the fact that ancient surveyors, from ignorance or bad faith, to measure two sitios measured four, and to measure that number measured eight or more sitios," etc., etc.

In his testimony in this case Mr. Flipper labored to demonstrate that in order to survey "one league to each wind" he would commence at a point and run one league east to a certain point, and from that last point at right angles south to another certain point, and from that last point west at right angles to another certain point, and from that point north to the original point of beginning.

At Record, page 222, however, Mr. Flipper admits that if a title paper states that you should start from an initial monument and measure one league to each of the four winds he would measure one league from that center towards each of the cardinal points of the compass, and that under the Spanish rules for surveying he would then run parallel lines through the opposite cardinal points and thus secure a square containing four square leagues instead of one square league.

Mr. Bonillas stated that in surveying a fundo legal or ejido on a square for a town it was customary to start at the church door, as a center and initial point, and to survey one league toward each wind in the mesa toward each of the cardinal points of the compass. (R., p. 131–2.)

On pages 55 to 59 of their brief in this case counsel for the Government have kindly produced further evidence in substantiation of the correctness of the statements of Mr. Bonillas. They there show that both Galvan and Escriche, the well-known Spanish authorities, lay down the rule that in order to survey a sitio it is always proper to start at a center as an initial point and to measure one-half a league toward each of the cardinal points, and to then run parallel lines through those opposite cardinal points, thus securing a square sitio.

In view of these rules laid down by Galvan and Escriche it is easy to understand how the simple, uneducated Indians of Sonora, in order to survey two square leagues, invariably adopted as a center the point at which the petitioner prayed for his survey to be made, and thereupon measured from

that point two linear sitios toward each of the cardinal points, thus measuring four square sitios instead of two, as stated by Mr. Mendosa in his letter.

No person who has examined even half a dozen of the title papers of Mexico private land grants that were made prior to said year 1839 can entertain a shadow of a doubt but that it had become an invariable rule and the uniform usage and custom in surveying two square leagues of land to start at a center point, where an initial monument was placed, and to thereupon measure two linear leagues toward each of the cardinal points of the compass, and in measuring four square leagues it was the uniform custom to start at such a center or initial point and measure four linear lines towards each of the cardinal points of the compass.

Not only was the method which was pursued by the ancient surveyors through ignorance, or possibly in some few instances by bad faith, but this custom was uniformly followed in all the surveys or grants which were made in the State of Sonora for many years after said letter was written by said Mendosa, and, as far as the knowledge of this writer extends, that custom was not altered or changed until after the adoption of the new constitution of 1856, when the National Government resumed control of the vacant public lands of the Republic.

No honest and intelligent person can take two or three of the title papers to private grants in Sonora and go upon the ground and examine the calls in said title papers and compare them with the natural landmarks describing the places where the monuments were put without immediately perceiving the exact and literal correctness of each and all of the statements made by Mr. Bonillas.

The investigator will then see at a glance that these ignorant surveyors had no conception of proper courses or distances, and that, although they religiously recited in the title papers that they scrupulously measured a particular number of cords in a certain direction, it is evident that no

such measurement was ever made in every instance. On the contrary, the petitioner always knew the exact land which he needed and which he desired to purchase for the Government, and the surveyors invariably selected one or two points for cardinal monuments from which the entire grant could be viewed and accurately described.

While deficient in knowledge of the modern methods of surveying, and even of the rudest method ever adopted in this country, those ignorant people were perfect in the art of describing natural landmarks so that the most inexperienced person could not fail to be convinced that he had found the exact point described when he arrived upon the ground. The writer was astounded by the remarkable precision with which such natural landmarks are described in all of the title papers which he has examined and has had an opportunity to compare with the monuments and places called for upon the ground.

Such a thing as a grant of a limited quantity of land within specified outboundaries was absolutely unknown in the State of Sonora, and in his laborious investigations the writer has failed to find a single instance of any such grant. If these innumerable mistakes in surveying had occurred through ignorance or even through bad faith on the part of the surveyors in the United States, there would have been no possible way of correcting or reforming the titles to the grants, under our system of government, except by the United States going into its courts as a plaintiff in innumerable suits in equity, and then the Government would have been bound to clearly prove the mistake or the bad faith on the part of the surveyor in each and every instance in order to reform or revise the corresponding title.

We have seen, however, that in Mexico the courts have no jurisdiction to reform or annul titles to land, and that the political arm of the Government has retained this power in its own hands. We have also seen that the judicial arm of the Government in Mexico has no power to declare an

act of Congress unconstitutional, but that the power to determine this question lies in Congress itself.

Hence when the National Government of Mexico resumed control of the vacant public lands of the State, and the new and more permanent Government began to seriously consider the question of adopting some system of public land surveys which would enable it to know what portion of the public domain still belonged to the Government, it naturally directed its attention to the innumerable and almost uniform mistakes which had been made in the surveys of grants which were concededly sold as grants by specific boundaries, but which almost invariably contained a much greater quantity of land than had been paid for at the ruling rate by the grantee. The legislative power of the Government thereupon determined to correct these mistakes and to reform these titles at the expense of the grantees and owners of the lands, and to thereby secure at the same time a survey and map of its own remaining vacant public lands.

In doing this, however, the legislative arm of the Government did not pretend that any of these grants had originally been grants of a limited quantity within specified outboundaries, or floating grants, as they are commonly called. On the contrary, the title of the grantee to the boundaries as specified in his title papers was distinctly and specifically recognized, and he was given the absolute and unqualified right to retain all the lands within said specified boundaries by paying to the Government the difference in price between the quantity originally paid for by him and the quantity contained within said boundaries.

This was in effect the equivalent of such a decree as might have been rendered by a court of equity in this country upon a suit by this Government to reform a title to a grant of land which had been made under similar circumstances and in a similar manner, and it was no more and no less.

They recognize both the legal and equitable rights of the

grantee by securing to him all of his improvements which were on the lands and by permitting him to pay for the lands which were in excess of the quantity originally paid for by him at a price not in excess of its original value at the time of its original purchase by the original grantee.

In the courts of the United States we can hardly doubt but that the Government would have been held, under similar circumstances, to have estopped by its own laches, whether any considerable length of time had elapsed after the grant was made and before suit was instituted to reform the title by the Government. (See *U. S. vs. Hancock.*)

We have seen that the National Government of Mexico was apprised of the fact that these mistakes in surveys were being constantly made by its officers as early as the year 1839; and the act of the Mexican Government in compelling innocent grantees and their *bona fide* transferees to pay for these excesses of quantity after a lapse of from twenty-five to one hundred years does not strike the ordinary mind of the legal fraternity in this country as either just or equitable.

If these were grants of land by specific boundaries at the time they were made they are still that character of grants, and no legislation by the Mexican Government since the date of the Gadsden Treaty can in any way affect or change that character. The only question remaining, therefore, is, What remedy has the United States and can it reform one of these Mexican grant titles in these proceedings? I shall leave the Court to decide this question in the consideration of some grant where it may need an answer, as it does not require one in this case, for these lands were not appraised by quantity at the time of their sale to the predecessor in interest to this appellant in 1844, and the original grantee paid for all the land appraised, as well as for all the land described and sold to him.

At page 50 of their brief counsel for the Government say:

"The result of the examination-in-chief of Mr. Bonillas, a summary of which has been attempted, reflects more credit upon his ability than it does upon his candor."

At page 53 of their brief counsel for the Government, in referring to Mr. Bonillas, say:

"In commenting upon his testimony it may be said that as a surveyor he was equal to the emergencies demanded of him by the grantees."

It is a significant fact which I shall leave to Mr. Reynolds to explain that Mr. Bonillas was employed by him to investigate the title of the Soproi grant, as an expert witness on the part of the Government, a few days after the close of the trial of this case, and the record in the case of *The Soproi Land and Mining Company vs. U. S.*, No. 277, now on appeal before this Court, shows that Mr. Bonillas did testify as a witness on the part of the Government in said case, and also shows that Special Agent Henry O. Flipper was not used as a witness by the Government in said case.

It is suggested by counsel for the Government that no monuments constructed of mortar and stone were found upon this grant, but Mr. Bonillas testified at pages 142 and 143 of the Record that not more than one or two per cent. of all the monuments he ever visited or saw in the State of Sonora were built of mortar and stone or consisted of anything other than a pile of stones similar to those which we find at the points designated as the sites for monuments on this grant.

Mr. Flipper does not attempt to dispute the correctness of this statement on the part of Mr. Bonillas and does not testify to the fact that he ever saw a single monument of mortar and stone during his labors as a surveyor in Sonora.

The counsel for the Government, at page 51 of their brief, say:

"It is clear by the testimony of Colin Cameron, more interested than Mr. Bonillas in sustaining this and every other

private land grant in Arizona, and who has by his testimony been instrumental in the reconstruction of more monuments than were destroyable by all the Apaches that ever run over the country, that he dare not attempt to sustain the ancient origin of a number of Mr. Bonillas' monuments."

This attack on Mr. Colin Cameron is not justified by a single syllable of testimony in the record of this case.

At Record, p. 99, Mr. Cameron testifies that he has no interest, directly or indirectly, in this grant, and at Record, p. 161, Mr. Cameron testifies that the only place he ever piled up any monument has been at the place where the calls of the expediente did not say that there was a monument, and that he piled up stones at such places to mark the particular point that we had taken, according to our construction of the calls of the expediente in connection with the natural landmarks. Mr. Cameron adds that he never piled up any stones in the same way anywhere else.

Mr. Cameron frankly states, however, at other places in his testimony and upon his direct examination that he did take some of the loose stones which were lying around the base of the monument, which is located at the place known as the Cienega Grande, and put them on the top of said monument, so that the monument could thereby be seen from the public road, which runs close by it.

BOUNDARIES OF GRANT.

ANALYSIS OF TITLE PAPERS.

In the other grant cases from Arizona this Court has been confronted with the important and difficult question whether the grant was intended to be one of quantity, afterwards to be located within certain specified outboundaries, or whether it was a grant by specific boundaries, containing a greater area, however, than that mentioned in the title papers.

This question is entirely eliminated from the grant now before this court.

In the original grant, which was made to the community of Indians of the Mission of Tumacacori in the year 1807, four of the principal natives of said pueblo of Tumacacori petitioned for a new title to certain lands which had formerly belonged to said mission and Indians, the ancient title to which had been lost. They requested that the lands necessary for a fundo legal or farm and an estancia or stock ranch be conceded to them, "with the understanding that the four leagues, one toward each wind, on account of the farm are to be marked out to us and are to be measured in a proportional and equitable extent in the direction that we may desire, at our discretion, for the just and prudent end of including within said four leagues such lands as are suitable for sowing purposes, and with the understanding also that in relation to lands that are to be given as an estancia (or stock ranch) they are to include the post Guebabi and its appurtenances, as well because this land is the most suitable for the stock of their Mission of Tumacacori and offers the best advantages for the increase of the same as because said Guebabi has been considered the property of said Mission (of Tumacacori);" and petitioners also requested "that there be included in the said sitios the post or place named 'La Boca del Potrero,' that being useful to them from the fact that it is situated near their mission." (R., p. 266.)

These four principal natives state that they make this petition for themselves and in the name and representation of all the natives of the community of the Republic of Tumacacori, because those four principal natives (Felipe Mendoza, José Ignacio Arriola, Ramon Panplona Jabier, and Ignacio Nedina) are then present in the capital. (R., p. 265.)

This petition was written and signed for them by an attorney or notary public named Ignacio Diaz del Carfio, and was filed at Arispe, the capital of Sonora, in the office of the intendente, on December 17, 1806; and on said day the

intendente appointed and directed Don Manuel de Leon, the comandante of the adjoining military post of Tubac, to make the survey of said lands, and directed him to " measure to said natives one league toward each wind or the four leagues where it may best suit them of the best lands adjoining their pueblo, without prejudice to third parties, ceding for this purpose the colindates, if there should be any; and besides the said four leagues there should be adjudicated to them an estancia for stock of the larger kind, which shall include at the most two sitios in the place most convenient to those natives." (R., p. 267.)

On December 23, 1806, another petition was filed with said Don Manuel de Leon, the person who had been designated to make said survey, and this petition was signed by another attorney or notary public named Fray Narcisco Gutierriez, who filed said petition at the request of the Governor, Juan Legarro, and of the natives of said Mission of Tumacacori.

This petition is dated as having been executed at Tumacacori, and in it the said " Juan Legarro, as Governor of the Mission of Tumacacori, for himself and in representation of all the community of this mission," states that he, said Juan Legarro, " clearly and evidently knows that this Mission (of Tumacacori), in the direction of Guebabi, is bounded by the rancho of Romero, the monuments of which still exist beyond the Yerba Buena, at which place also exists a corral in which rodeos were held by our mission, and on the Potrero side, the measurement reaching to the end of the marsh (cienega), and learning from Don Manuel Carrera that the papers had been in his possession, and that these sitios had been in years anterior purchased with the money of the common fund of the mission and natives, and that these papers are lost." (R., p. 272.)

Counsel for the Government find something peculiarly significant in the fact that said four principal natives stated in the petition, which was prepared for them at Arispe, sev-

eral hundred miles away from Tumacacori, and in the absence of said Governor Juan Legarro, that they (said four natives) did not know the exact boundaries of the lands belonging to said Mission of Tumacacori, whereas said Governor Juan Legarro states in his petition, which was afterwards filed at Tumacacori, that he does personally know where certain of said boundaries of the lands belonging to said Mission of Tumacacori are located. I fail to see anything astonishing about this fact.

The amended petition which was filed by said Governor of the Mission of Tumacacori prays that said surveying officer "may be pleased to hear and take the sworn testimony of the Romeros, Apodacas, Baes, and other old residents, who are acquainted with the facts stated," in said petition. (R., p. 272.)

Thereafter and prior to the survey being made by said comandante of Tubac, Manuel de Leon, the testimony of the witnesses named in the petition of said Governor was taken before said Manuel de Leon.

The witness Apodaca states that he is a resident of Santa Cruz, which is a well-known town of considerable size still existing at a distance of about twenty-five miles from this ranch, within the Republic of Mexico. This witness stated that he owned an interest in the rancho of the Romeros; "that said Mission of Tumacacori is bounded on the south or where Guebabi is situated by said rancho of the Romeros; that he knows that at present exist the monuments which divide the lands of Tumacacori and the Romeros, said monuments being placed beyond the place called Yerba Buena; that in the direction of the Potrero he knows and swears that said monuments were placed above the large marsh (Cienega Grande); that in the direction of the east the monuments were placed at the Cañon of Sonoita upon a gradually sloping mesa." He stated that he knew these facts "because he had been present at the rodeos of said mission; had heard the ministero of said mission say so,

and had also heard the late Manuel de la Carerra say that if any doubt should arise as to the lands of said mission—these of the interested parties, those of the Romeros, Santa Barbara, and other places situated in the direction of Guebabi or in the valley of the Potrero—that if they would come to his house they would find any documents necessary;" that he knew that said Manuel de la Carerra "had been judge for many years and had collected all the papers in relation to the lands or sitios and took them with him." The witness stated that he was seventy years of age, and hence it appears, inferentially, that he must have known the boundaries of this Mission of Tumacacori for a period of time running back almost to the date of its foundation by the Jesuits. (R., p. 273.)

It is important to notice that he was one of the owners of adjoining lands upon the south, and that the *south* monument, whose location he states was beyond the Yerba Buena, was the *dividing* monument between his own lands and those of this mission.

On the 7th day of January, 1807, Juan B. Romero, a sergeant of the company of Presidio of Tucson, and who was then a resident of the Presidio of Tubac in some official capacity, testified before said surveying officer that he knew the boundaries of the Mission of Tumacacori "since childhood; that his late father took him as a child and told him that the Mission of Tumacacori was bounded by the ranch of Buena Vista, belonging to them (that is, to the declarant and his father), and that the landmarks of the Tumacacori are situated above the Yerba Buena, and that Don Manuel Carerra, as political judge of that jurisdiction, assured him that he had in his possessions the papers in relation to this place and other places in the neighborhood." (R., p. 274.)

It should be noted that the ranch of the Romeros spoken of by the preceding witness and the ranch of Buena Vista

are one and the same ranch, the last-named witness being one of said Romeros and one of the owners of said ranch.

On the 9th day of January, 1807, Pedro Baes testified before said surveying officer that he knew the boundaries of said Mission of Tumacacori; that "it was bounded on the south by the rancho of Buena Vista, a ranch belonging to the Romeros, the monuments of which bound the lands of the Romeros near the said mission; that the landmarks of the mission still exist, although thrown down above the Yerba Buena; that said witness was raised on said rancho of the Romeros; that the mission held its rodeos on the boundaries of the Yerba Buena, the remains of which are still seen, where the Romeros used to come to the rodeos so as to take out their cattle; that it is well known that those lands were purchased by the mission; that the corporal Eugenio, whom he raised and who was corporal of Tucson, and had been taught to read from the documents relating to the title which had been placed in his hands and which he had read; that on the said Potrero the measurements reached as far as the Pajarito above the large marsh (Cienega Grande), where the monuments were placed, and on the south as far as the Cañon of Sonoita upon a very 'tendida' gradually sloping hill." (R., p. 274.)

It will be noticed that this witness has inadvertently, by a *lapsus linguæ*, stated that the monument on the "south" was placed as far as the Cañon of Sonoita and upon a very gradually sloping hill. The witness had already stated that he was himself raised on the rancho of the Romeros, viz., the rancho of Buena Vista; that this ranch bounded the Mission of Tumacacori on the south; that the monument on the south was above the Yerba Buena, which we shall presently see is a very well-known place even to this day. The witness had also already stated that the monument on the side of Potrero reached above the large marsh or Cienega Grande, which we shall also presently find is a very well-known place even to this day.

We must also bear in mind that these witnesses were called for the purpose of establishing the location of the monuments of this grant in the direction of the Mission of Guebabi; that the monument which divided the ranch of the Romeros from the Mission of Tumacacori was actually south and above or up the river from where the old ruins of Guebabi still stand at this day, and that said place of Yerba Buena is also south and above or up the river from said ruins of the Mission of Guebabi.

The Cañon of Sonoita, on the contrary, lies east of the ruins of said Mission of Guebabi, and each of the other witnesses has corroborated this witness as to the monuments on the south above the Yerba Buena and as to the monument above the Cienega Grande; and said witness Apodaca also stated that in the direction of the east the monuments were placed at the Cañon of Sonoita upon a gradually sloping mesa.

Hence it is apparent that this witness intended to state that the monuments of said lands of the Mission of Tumacacori in the direction of Guebabi were on a very gradually sloping hill at the Cañon of Sonoita on the east and not on the south. Either said witness made a slip in testifying, and said south when he meant east, or, what is still more likely, the clerk who wrote down the testimony made a mistake and wrote "south" where the witness had stated "east."

Counsel for the Government have attempted to make a mountain out of this molehill, and have insisted that this grant should be held void for uncertainty because of this slight mistake.

We shall presently see that all of the witnesses on the part of this appellant have located this east monument of the estancia or stock ranch at a point on the side of the Cañon of Sonoita, at the end of a very gradually sloping hill or mesa and almost directly east of the meadow lands which lie on the river bottom at the nearest point above the

old ruins of the Mission of Guebabi, and which exhibit at this day unmistakable evidence of the fact that they were extensively cultivated in ancient times and were irrigated by a ditch cut through solid rock from a point in the river immediately adjoining and above said old ruins of the Mission of Guebabi.

It should be remarked that the Cañon of Sonoita is a very well known and unmistakable place at this day, and that at a point a very short distance, almost directly east, from the meadow lands just mentioned, near the ruins of Guebabi, a mesa commences which is very long and narrow and which gradually rises until it reaches the said Cañon of the Sonoita, in the direction of the east, where it abruptly ends.

From that point there is a precipitous and rough decline into said cañon, down which it would be impossible to even lead an unburdened horse (R., pp. 119, 224). The cañon itself is all broken with gulches, and was formerly so heavily covered with timber and underbrush that it was almost impossible to work one's way through it, as we are told by Mr. Barrett in his history of the boundary survey. (R., p. 151.)

Said comandante of Tubac, Manuel de Leon, when making the survey of the estancia or stock ranch of this grant on the 15th day of January, 1807, and after having heard and taken the testimony of said witnesses in regard to the location of the east monument of the lands of the Tumacacori Mission, in the direction of Guebabi, describes his location of this east monument as follows:

"A direction was taken to the east, in which direction was carefully counted and measured twenty-seven cords, the line terminating at a hill (serro), and it being impossible to proceed further in this direction on account of the ruggedness of the country; whereupon the parties interested asked me to give them the remainder of the cords in the direction of the potrero, which was on the west, and consenting to their request as reasonable, I ordered to be placed, and there was placed, at the foot of said hill (serro) *of San Cayetana*, on the side looking toward the south, another mound of stone as a sign for a landmark." (R., p. 271.)

It will be noticed that in describing the location of this east monument said surveyor first describes the east line as terminating at a hill merely, and then states that on account of it being impossible to proceed further in that direction on account of the ruggedness of the country, he ordered to be placed, and there was placed, at the foot of said hill a mound of stones as a sign for a landmark. In mentioning said hill the last time, however, the words "of San Cayetana" are added.

The remainder of the description given by this surveyor corresponds exactly with the descriptions of this east monument which were given by said witnesses Apodaca and Pedro Baez before said surveyor only a few days prior to this survey.

The words "of San Cayetana" are another palpable clerical error merely. They were probably inserted by the clerk who wrote the proceedings of that day prior to their being signed.

The only witness on the part of the Government who pretends to dispute the location of a single monument of this grant is Henry O. Flipper, a special agent of the Department of Justice and one of the codefendants with the United States in this case, and who claims to own 160 acres of the best land upon this grant (R., p. 205). The other hundred or more settlers were represented in court upon the trial of this case by William H. Barnes (R., p. 23), an intelligent and experienced attorney, who had previously served a term as one of the justices of the Supreme Court of Arizona; yet not a single one of said defendants took the stand as a witness or in any manner attempted to controvert the location of a single monument as established by the testimony of four unimpeachable witnesses on the part of this appellant.

We shall presently see by the testimony in this case that even said witness Flipper admitted under cross-examination that in proceeding east from said meadow of Guebabi he

found a mesa which was very long and narrow and which sloped gradually in the direction of the east until it reached the Sonoita Cañon; that he was able to drive in a carriage up said mesa to within a short distance of said Sonoita Cañon, and that at the edge of said mesa and on the side looking toward the south, at the foot of a large hill—which hill is shown in the photograph marked E 5, between R., pp. 264 and 265—he found an old monument of stones, which monument he identifies as being represented by the photograph marked B 5, and which monument he admits bears no signs of ever having been changed in any way. (R., p. 224.)

Said witness Flipper also admits under cross-examination (R., p. 224) that the country beyond the point where he found this monument, and in the direction of the Sonoita Cañon, is precipitous, and that it would be almost impossible to go down into the cañon from that end of the mesa with a horse, and that after you get down there the cañon is all broken up—full of gulches—and that at the end of a day's work, after surveying over a smooth mesa like that, it would look pretty rough down there.

The witnesses, including said Flipper, all agree that the place known as the San Cayetana Mountains lies in a northwesterly direction from said meadow and ruins of Guebabi, and also northwesterly from the ruins of Calabasas, and that it would be impossible to start at any point in said San Cayetana Mountains and run west and thereby reach or cross any point within the possible boundaries of said estancia or stock ranch as described in said title papers.

In the face of these facts it seems to be seriously contended by the counsel for the Government that this grant is void for uncertainty and cannot be located upon the earth's surface solely because of the fact that said words "of San Cayetana" make it impossible to locate the east monument of said estancia or stock ranch in accordance with the remaining description of said point.

By striking out said words "of San Cayetana" as a clerical error, there is not a single word of testimony left in this case which in any way throws a particle of doubt upon the exact location of each and every monument of this grant as called for in said title papers of 1807.

I assert, without fear of successful contradiction, that any surveyor who goes upon the ground with said title papers of 1807 in his hands and attempts to locate this grant—taking into consideration the condition of the times at which the same was made, and taking into consideration also the unmistakable location of said Missions of Tumacacori, Calabasas, and Guebabi and their requirements in the way of farming lands and of lands for stock-raising—will immediately reject said words "of San Cayetana" and will locate this grant exactly as the same has been established by this appellant and as it appears in the map which was made by Mr. Bonillas, which is found between Record pages 346 and 347. (R., p. 142.)

MISTAKE OF MR. REYNOLDS IDENTICAL WITH THAT OF WITNESS PEDRO BAES IN TITULO OF 1807.

It is surprising that Hon. Matt. G. Reynolds, as counsel for this great nation, would waste any time that this grant is void for uncertainty because of the one or two verbal slips which appear in the description of the location of the monuments of this grant, in view of the fact that upon the trial of this case said counsellor made at least two slips himself of an exactly similar nature.

For instance, at page 137 of the Record, Mr. Reynolds, in cross-examining Mr. Bonillas, says:

"Q. Now, returning to the northwest corner monument of the Tumacacori survey, which you have described as the devisadero, and you say there is a lookout hill" (interrupted)——

"A. Not the northwest corner, sir.

"Q. Northeast I should have said. That was my mistake. You are right."

And yet Mr. Reynolds seems to think it is very strange that one of the witnesses, in referring to the east center monument of the stock ranch, inadvertently called it the "south" center monument of said ranch. The context shows that this was a mere slip on the part of said Baes or of the clerk who wrote out those proceedings just as plainly as Mr. Reynolds' frank admission shows that he merely made a verbal slip in this instance. (R., p. 274.)

MISTAKE OF MR. REYNOLDS IDENTICAL WITH SAN CAYETANA MISTAKE OF SURVEYOR LEON IN TITULO OF 1807.

But Mr. Reynolds seems to think it would be an impossibility for the partially educated clerk who wrote out those proceedings of the survey of Leone describing said east center monument of said stock ranch to have inserted the words "of San Cayetana" after the word "serro," or hill, the last time said hill is mentioned in said description; and the absence of said words "San Cayetana" the said first time said hill is mentioned in said description and only a few lines preceding said last time does not disturb Mr. Reynolds one iota, and in no way tends to convince him that this was a clerical error on the part of the writer of said document, even though Mr. Reynolds well knows that it was a physical impossibility to have run toward the east from any point on said stock ranch and to have thus reached the real San Cayetana mountain.

Yet at page 139 of the Record Mr. Reynolds himself makes exactly the same kind of a mistake. We find there the following questions and answers:

"Q. In making this survey you paid no attention to the Calabasas except so far as it was called for by the south center line of the survey of the agricultural lands called for

as terminating at the ridge of the Sonoita cañon near the ruins of old Calabasas?

"A. Not the Sonoita cañon.

"Q. Of the cañon. Strike out the word Sonoita.

"A. Gulch, it means.

"Q. Well, gulch. That was the only bearing that Calabasas had on your survey at all, was to designate that point?

"A. Yes, as to that line; as to the designation of that line."

If it is possible for such a highly educated, acutely intelligent, and deeply learned member of the legal profession as is Mr. Reynolds to make the mistake of designating a gulch which is near old Calabasas as the Sonoita cañon, which lies many miles away from that point, it does not seem to require a very great stretch of the imagination or a very great desire to personally construe the titulo of 1807 so as to effectuate the plainly expressed intention of the parties thereto for us to reach the conclusion that the words "of San Cayetana" were inserted by mistake and as a mere clerical error the second time that the hill at the end of a long, narrow mesa upon the ridge of the Sonoita cañon was mentioned as the place where the pile of stones was put as marking the site of the east center monument of said stock ranch; and this is especially true when by striking out said words "of San Cayetana" the description of the natural landmarks and of the particular locality and place where this pile of stones was put to mark the site for a monument, which was given by two witnesses who were the owners of the adjoining lands, and the description which was given by the officer who made the survey, exactly coincided in every particular.

It is suggested by counsel for the Government that the original map of this grant, which was filed by this petitioner as part of his petition and which is found between R., pp. 6 and 7, differs from said map made by Mr. Bonillas.

The map filed with the petition was made according to a survey by Messrs. George J. Roskruge and Frank W. Oury.

It differs from the map of Mr. Bonillas in two particulars only, and it agrees with the map made by Mr. Bonillas in the location of every monument and natural landmark called for in said title papers.

The points of difference are, first, that Mr. Bonillas followed the meanderings of the mesa on each side of the narrow valley, in which are included the farming lands of the Mission of Tumacacori, whereas Messrs. Roskruge and Oury did not take the trouble to follow those meanderings closely, but ran straight lines from and to certain points, so as to make sure to enclose all of the agricultural lands of the valley, as it was stated in the title papers that this was the desire of the said natives of Tumacacori.

The difference between the methods of survey pursued by said Roskruge and Oury and that pursued by said Bonillas results in the survey of Messrs. Roskruge and Oury showing 9,200 acres as the area of the agricultural lands, whereas the survey of said Bonillas shows 9,515.8 acres as the area of said agricultural lands; and the survey of said Roskruge and Oury of the estancia or stock range results in 72,150 acres as the area of said stock range, whereas the survey of Mr. Bonillas results in only 63,730.9 acres as the area of said stock range.

The second point of difference between these two surveys is the cause of the reduction of the area of the stock range in the survey which was made by Mr. Bonillas.

In both these maps the south monument of the stock range is placed at a point above the Yerba Buena and near a place called Vado del Apache. From that point Mr. Bonillas runs his south boundary line to the monument at the Cienega Grande. From that monument he runs his south boundary line parallel to the line running from the center monument of said stock ranch to the west center monument of said stock, ranch whereas Messrs. Roskruge and Oury omitted to run the south line of the stock ranch from said point above the Yerba Buena to the Cienega Grande monument,

but ran said south boundary line directly from said point above Yerba Buena toward the west and parallel throughout its entire length with the line connecting said center monument of the stock ranch with the west center monument of said stock ranch. This was done solely in compliance with my own orders and directions, and was due wholly and entirely to my own misconception of the manner in which the laws of Mexico required the outside lines of a survey to be run under such circumstances.

The testimony of Colin Cameron establishes these facts at R., pp. 168–'9.

There is one clerical error in said map of Messrs. Roskruge and Oury, viz., the said center monument at the point above the Yerba Buena is erroneously designated on the map as the Vado Seco, instead of being designated as the Vado del Apache. The Vado Seco is a well-known place, and is actually located northwest of the Yerba Buena and down the river from that point, as was established by many witnesses upon the trial.

We were unable to explain these seeming discrepancies between the two maps by the testimony of either Mr. Oury or Mr. Roskruge for the reason that Mr. Oury had died prior to the day of the trial, and because Mr. Roskruge, who had been expected to testify, was confined to his bed by a sudden attack of illness, and was thus prevented from being offered as a witness before the Court of Private Land Claims. The evidence of both these facts appears in the record. (R., pp. 168, 185.)

In the survey of said lands which was made by the said comandante of Tubac, Manuel de Leon, the east monument of said stock ranch was placed at the point described in the testimony of said witnesses, as we have just seen. The south monument of said stock ranch was placed at a point called the Vado Seco, which was some distance below the Yerba Buena. The west monument of said stock ranch was placed on the slope of the highest hill to be seen from

the Potrero. Said survey was completed by Leon on the 15th day of January, 1807, and Leon states that on January 17, 1807, he delivered the proceedings, which had been taken and performed by and before him, to Juan Legarro, the Governor of the Mission of Tumacacori; and an examination of the title papers of 1807 shows that these proceedings were delivered to said Legarro, and that he added thereto another petition for additional lands, as well as said testimony of said witnesses in regard to the location of the monuments of said additional lands. (R., p. 272.)

On March 18, 1807, an additional petition, by said four "principal natives of the pueblo of Tumacacori, in the name and representation of the community of the natives of said Republic," was filed with said intendente; and this petition contains the statement that the petitioners have "produced before the official commissioner (said Leon) the judicial proof, which is set forth in three written folios," by which it is shown that their lands on the south "are bounded by the rancho of the Romeros and beyond the place called Yerba Buena, and on the side of the valley of the Potrero as far as the upper end of the large marsh (Cienega Grande), and on the side of the east as far as the Cañon of Sonoita; which lands and places belong to us (said natives of Tumacacori) by legal, public, and judicial purchase from their primitive and legitimate owners," and that they have owned them since the time of the Jesuits. The petition proceeds to pray that these lands be adjudicated to them on account of their increase of stock and the necessity they have for the same. (R., p. 275.)

On the same day, at the capital of Arispe, the intendente ordered said petition and the testimony of said witnesses to be annexed to the expediente and the report of said Leon, and that the same should be passed to the Attorney General. (R., p. 276.)

On March 30, 1807, the Attorney General made his report to the intendente upon this expediente and recommended

that, in view of the fact that the stock, cattle, and horses of Tumacacori were increasing by reason of the industry of the natives, they should be granted all the land described in said survey which was made by said Leon, as well as all the land which had previously been occupied by the abandoned pueblo of Calabasas, and the dimensions of which are shown in the testimony taken before said comandante of Tubac, Manuel de Leon. (R., p. 276.)

On the 2d day of April, 1807, said intendente executed and delivered said titulo of 1807 in favor of the community of Indians of Tumacacori, granting them all the lands "that are set forth and described in the foregoing proceedings of measurement and the testimony." (R., p. 278.)

It will be noticed that the lands granted are not only those which are included within the said proceedings of measurement, but those which are included in the testimony, viz., in said testimony of Romero, Apodaca, and Baez.

In other words, the intendente grants them all the lands within the boundaries as surveyed by said Leon, and in each instance where said Leon did not extend a line of his survey to the point to which said witness stated that the lands of said Mission of Tumacacori extended, the grantees are entitled under said conveyance to extend the line of said survey to the point described in the testimony of said witnesses.

The granting officer recites the fact that he makes said grant in pursuance of Article 81 of the Royal Ordinances and Instructions to Intendentes and in conformity with what is set forth in the Royal Cedula in relation to this matter on the 15th of October, 1754. (R., p. 278.)

Article II of said Royal Instructions of October 15, 1754, reads as follows, viz.:

"The judges and officers in whom is delegated the jurisdiction over the soil and composition of granted lands shall act with lenity, forbearance, and moderation, with verbal and not judicial process in questions of lands held by In-

dians, and all others where it may be necessary, and in particular where there are farms, farming and stock-raising are in question, since in regard to community lands and those granted other towns for pastures and commons there is no occasion to do anything new but to maintain them in position thereby and to restore to them those that have been taken from them and give them more land as the exigencies of the population require; and do not use rigor in regard to those held by Spaniards and people of other castes, keeping in mind the provisions of laws XIV, XV, XVII, XVIII, and XIX, Title XII, Book IV, Compilation of the Indies." (Reynolds, p. 51.)

It will be noticed that this law authorizes the intendente to use his discretion in regard to the amount of lands which he shall grant to the Indians, and he is directed to be lenient, and to give them all the land that they seem to require, and particularly where farms, farming, and stock-raising are in question. In petitioning for these lands the natives set forth the fact that they need and require them, and that they need and require additional lands for farming and stock-raising purposes, because of their growing population, etc., and the Attorney General recommends that these additional lands be granted to them on that account.

The Mission of Tumacacori was entitled by law to four sitios of land as a farm and two sitios of land as a stock ranch, besides other lands as colindantes. The Mission of Calabasas was entitled to a similar quantity and the Mission of Guebabi to a like quantity; hence it appears that the Mission of Tumacacori was granted all the lands in its own mission, as well as all the lands of the Mission of Calabasas, and likewise all the lands of the Mission of Guebabi which it had previously purchased. It is apparent that the total quantity of land which was granted to said Mission of Tumacacori by said deed of 1807 was not less than 18 sitios or about that quantity.

The total quantity of lands within the boundaries of this grant as established by the appellant is 73,246.7 acres, or a little less than 17 sitios.

BOUNDARIES OF GRANT.

ANALYSIS OF SURVEY AND MAP OF Y. BONILLAS.

A map of this grant appears between R., pages 346 and 347. It was made by Mr. Y. Bonillas from his field-notes of the actual survey of the grant. (R., p. 142.)

In the case of *McIvers, lessee, vs. Walker*, 9 Cranch, 178, speaking through Chief Justice Marshal, this Court said:

"It is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey. Consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects.

"The reason of the rule is that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances are more probable and more frequent than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated and accurately described."

In the case of *U. S. vs. Billings*, 2 Wall., 449, this Court said:

"The formula of this delivery of possession or livery of seisin did not require a survey of the estate."

In case of *U. S. vs. Hancock*, 133 U. S., 193, Justice Brewer, speaking for this Court, said—

"If (the survey is) made in good faith and unchallenged, as this has been for over 15 years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented."

In the case at bar the survey has remained unchallenged for over ninety years.

The titulo of 1807 states that in making the survey the surveyor, Manuel de Leon, for the purpose of commencing the measurement of the lands pertaining to the mission as a farm, proceeded as follows:

INITIAL POINT OR CENTER OF TUMACACORI GRANT (AGRICULTURAL LANDS).

"Wherefore the cross in the burying ground in said mission was fixed upon as the center, the measurements of the land as asked for to commence at said cross." (R., p. 268.)

Mr. Bonillas testifies (R., p. 142) that he made the map just referred to from field-notes of the survey of the grant which was made by him, and that—

"In making this survey I had a certified copy of the testimonio or title papers of the grant. The starting point for the Ejidos—fundo legal, as the lands are called in the testimonio—is given as a cross standing in the graveyard of the Mission of Tumacacori. I had no difficulty in finding the mission, and I went right there." (R., p. 107.)

"There is an old church—the ruins of the church—there, and the graveyard itself, which is very well preserved, and very well preserved walls are there, with cement, and it is today a very fine enclosure—good wall. The graveyard is in the rear of the church, towards the north. It is about 75 feet wide by 200 feet long. I took no measurements of it and am guessing at the dimensions.

"I took an enclosure around one—that is, in this graveyard as the center. I have seen other graveyards similar to that one, and I have seen what they call a little chapel, where they used to pray, and those were surmounted by a cross, and I think that cross was on top of this circular or round enclosure. I took that as the starting point." (R., p. 108.)

The witness then identified Exhibit "C," Exhibit "D" as photographs of said church, and Exhibit "R" as a pho-

tograph of said chapel, upon the top of which he believed said cross to have been located. (See photographs in R., between pages 284 and 285.)

Witness Henry O. Flipper.

"I measured the old burying grounds at the old Tumacacori and it is 175 feet 6 inches by 61 feet wide." (R., pp. 201, 202.)

(Cross-examination:)

"I know where the Tumacacori Church is and know the graveyard which is in the rear of the church, and the circular mortuary which is shown by the photograph marked Exhibit 'R.'

"My opinion now is that the cross which was taken for the initial point for the measurement of the Tumacacori claim undoubtedly stood on top of the mortuary. I don't think there is any doubt about it," "and the starting point of said Tumacacori grant was in front of that cross and inside of that enclosure." (R., p. 207.)

The witness Colin Cameron corroborated this testimony as to the location of the initial point or center monument of said Tumacacori grant. (R., pp. 154–156.)

The witness Bayze also corroborated this testimony. (R., p. 170.)

NORTH CENTER (AGRICULTURAL LANDS).

Leon says:

"I went to the said place of the burying ground, and, being in front of the cross, the point fixed as the center, I placed a compass, properly regulated, which I had also brought for the purpose. I took the direction of the north and down the valley, and then carefully measured and counted 50 cords, the line terminating at a point in front devisadero (lookout hill), which point stands between the point where you reach the valley and two very large alamos (cottonwood trees) standing outside of the river bed, at which point I ordered a number of stones to be placed as a sign

for a landmark, which was done, proceeding no further in this direction because the boundaries of the presidio of Tubac were reached." (R., p. 269.)

At R., p. 267, Leon states that the Presidio Tubac is distant one league, or three miles, from the Mission of Tumacacori.

Witness Bonillas.

Beginning at R., p. 108, Mr. Bonillas says:

"I did not find the north center monument. It is described as being established on the descent to the valley 50 cords north from the center point, in front of the devisadero, and the way I understand it, or understood it when I got on the grounds first, is that the point where the monument was established was between this devisadero and some large cottonwood trees which grew outside of the river channel. Although the literal reading of the document would lead one to believe that the devisadero stood between the point where the line terminated and these cottonwood trees, that is a topographical impossibility when one gets on the ground, and then one cannot fail to understand what they mean in the document. I got to this point in front of the devisadero, and to the west, on the edge of the valley, I found a very large and old monument of loose stones, and on top of the devisadero I found a similar monument. The title papers or documents I had in my power at the time said they did not go further north or down the river with the survey on account of meeting the boundary lines of the lands of the presidio of Tubac. Those two large monuments that I found there I have reason to believe and I believe were monuments of the town lands of Tubac and were adopted as the monuments of this pueblo or mission grant, as their object, as they say, was to take the agricultural and little of the unproductive lands on both sides of the valley."

See R., p. 269, where Leon states that when he had finished the survey of these farming lands, "no other agricultural lands being found in all the valley or in its

neighborhood, and taking some cords of the barren lands in the direction of the east and west."

Mr. Bonillas proceeded to state that—

"The valley north of the mission extends in a general direction north and south. From the mission it runs slightly towards the southeast. This devisadero is a hill that rises above the rest of the rolling hills which are characteristic of the banks there, about this part of the valley, and the name that it has is very appropriate, because when you get to the top of it you look the country all around, and this is what we mean in Spanish by devisadero, a point from which you can devisar or look out or watch all around."

"You can see Tubac and the houses in that town plainly from the top of this devisadero, and you can also see the Mission of Tumacacori."

"The devisadero is located just about half way, I think, between the Tumacacori Mission and Tubac. It may be a trifle further to Tubac from that line than to the mission; but, speaking in general terms, I would say it was just about half way, as the description gives it."

"The devisadero is the point I establish as the northeast corner monument." * * *

"I made up my mind then that I would take those two monuments that I found on both sides of the valley—the line connecting them—as the north boundary line of the lands of Tumacacori Mission." (R., p. 109.)

The cross-examination of Mr. Bonillas upon the question of this north center monument appears at R., pp. 123, 126–'7, 127, 138, and I submit that it strengthens the position taken by him upon his direct examination.

At R., p. 143, we offered to prove by Mr. Bonillas that the map made by Deputy U. S. Surveyor Harris under the direction of the Surveyor General of Arizona in the year 1880 adopted this same hill as the devisadero called for in the title papers and limited the purposes of our offer to introduce the map made by Mr. Harris to that of tending to establish the fact that the natural landmarks called for in the title papers are well-known places, but the court sus-

tained an objection by Mr. Reynolds and ruled the Harris map out.

At R., p. 144 Mr. Bonillas accounts for the absence of any pile of stones to mark the place for the north center monument by the fact that it was placed in the center of the valley and that the Santa Cruz river, which runs by there, is subject to great overflows in the rainy season, and that it is not infrequent for such overflows to destroy and cut up land, tear down trees, etc.

Witness Flipper.

(Cross-examination.)

On cross-examination Mr. Flipper states that he knows the devisadero or the lookout hill which is to the north of the Tumacacori church; that it is a well-known place and is the place taken by Mr. Bonillas in his map, and that some cottonwood trees grow outside of the river bank on the opposite side of the valley from said devisadero, and that to the north of this the cottonwood trees really grow in the bed of the river, as the river there spreads over all the country. (R., pp. 207–'8.)

The location of this devisadero and of these cottonwood trees was also established by the testimony of Colin Cameron (R., pp. 147–'8), and by the testimony of Thomas Bayze. (R., pp. 170–'1.)

The fact that this devisadero which was taken by Bonillas as the place called for in the title papers is a well-known place was also established by the testimony of Jesus Maria Elias at R., pp. 61–'6. This witness was born at Tubac and lived at Calabasas until he was seven years old. His mother and father were married in the church at Tumacacori, the photograph of which appears in the record, and his grandfather was the administrator of the hacienda of the Mission of Tumacacori.

SOUTH CENTER MONUMENT (AGRICULTURAL LANDS).

Leon says:

"Returning to the center, a direction was taken south, in which direction was measured and counted with equal care 332 cords, the line terminating on the upper side adjoining the gulch close to the place called Calabasas." (R., p. 269.)

It will be noticed that in making the survey Leon only ran 50 cords toward the north, and ran 332 cords or nearly seven times as far toward the south. As the distance from the mission church to said devisadero which marked the north center monument is actually about one and one-half miles, as is stated by Leon in the title papers at R., p. 267, and as said Mission church has been established as the center point of the grant beyond all question, and as the only witness on the part of the Government admits that the devisadero which was taken by Mr. Bonillas is the one referred to in the title papers as being opposite the north center monument, we may reasonably expect to find the south center monument at a point seven times as far from said Mission church as said devisadero is from the same place. In other words, we may reasonably expect to find the south center monument at a point about ten and one-half miles from said Mission church in the direction taken by said Leon.

The map of Mr. Bonillas shows that the point taken by him as the south center monument of the farming lands is at a distance of almost exactly ten and a half miles from said Mission church.

It is contended by counsel for the Government that by the words "the line terminating on the upper side adjoining the gulch close to the place called Calabasas" Leon meant that the point adopted by him as the place for the south center monument of these lands was a point on the upper side of the tract of land which belonged to the Mis-

sion of Calabasas. This construction is adopted by counsel for the Government and by Special Agent Flipper.

To adopt this construction of the language would compel us to accept a point which would be much less than seven times as far from said church or initial point than is said devisadero.

I believe it is also contended on the part of the Government that the words "upper side" refer to the very tract which was then being measured, and witness Flipper did state upon cross-examination that he so believed; and hence Surveyor Leon is made to state that in surveying a tract of land whose boundaries were as yet unknown and unfixed he ran from the initial point to a point on the upper side of the very tracts he was then measuring. This would be absurd.

The words "upper side" are construed by Mr. Bonillas as referring to the upper side of said gulch which is close to the place called Calabasas, to wit, to the Mission of Calabasas.

Mr. Frank Oury in making the survey for the map which was attached to the petition of appellant construed these words "upper side" as referring to the valley of the Santa Cruz up which the surveyor Leon was then running his line, and the witness Colin Cameron at R., pp. 156, 157 testifies that the valley containing the agricultural lands which were then being measured as a farm for said Mission of Tumacacori becomes very narrow at a point close to the old ruins of Calabasas and right where a gulch comes into the valley at that place.

At R., p. 172, the witness Thomas Bayze testifies that the ruins of old Calabasas are on the southern boundary of the valley, and he explains that he thereby means that the valley pinches out at that point. He further states that a cañon comes into the valley at that point just above the old ruins.

It is apparent, therefore, that the surveyor Leon may

have intended to refer to the valley when he stated that the line terminated upon the upper side, but by accepting this construction of those words Mr. Oury was simply compelled to adopt the opposite side from that taken by Mr. Bonillas of the same little gulch which comes into the upper side of the valley close to the ruins of old Calabasas at that point. In other words, the point taken by Mr. Oury and the point taken by Mr. Bonillas are not more than 30 or 40 feet apart.

Witness Flipper.

At R., p. 227, Mr. Flipper testifies that there is a gulch running into the valley adjacent to the ruins of old Calabasas, and that the gulch is only about fifty yards from the ruins. In order to avoid admitting that this place for a monument was correctly located by Mr. Bonillas, it became necessary for Mr. Flipper to finally take the position that he had no means of knowing where the old ruins of Calabasas were, although these ruins stand there to this day, or, rather, the ruins of the houses reconstructed by Gandara in 1851 out of the ruins of the old mission still remain there. (R., p. 228.)

The witness Jesus Maria Elias testified that in building his houses Gandara had reconstructed the ruins of the old mission. (R., p. 62.)

Witness Bonillas.

At R., p. 110, Mr. Bonillas says:

"Next I went to look for the south center monument. The title papers said that from the center 332 cords were measured towards the south. I think they say along the valley, but I am not certain of that, the measurement terminating on the upper side, adjoining the gulch near the place called Calabasas. I went to the place called Calabasas, as it is quite a well-known place, and to the south of it there is a gulch adjoining right close to Calabasas, to the ruins of Calabasas, and on the upper side or the southern side I looked

for the monument. I was disappointed when I did not find it there, because I thought that was just exactly the place where it ought to be, but on reading the papers that I had, I found that there is no mention of a monument having been established there. I suppose the description of the topographical features of this place was so precise that they did not deem it necessary, perhaps, to establish a monument. They do not mention it, and there is no monument there, but I could fail to accept that place as the place called for."

At page 43 of their brief the counsel for the Government quote this testimony of Mr. Bonillas, and then say:

"Mr. Bonillas's examination of the title papers at that time must have been rather superficial, as Leon, the surveyor, in surveying the first line of the estancia, says that in running towards the north there was measured 80 cords, the line terminating at the same monument to the agricultural lands, the same being in one body."

Counsel for the Government must pardon me for suggesting that they made a serious mistake by not securing the services of Mr. Bonillas as an expert for the Government instead of the services of Mr. Flipper, who has doubtless led the learned counsel into this ridiculous blunder; for I would regret to suppose that the examination of the title papers made by counsel for the Government, both at the time of trying this case and at the time of writing their brief, was as superficial as this blunder would seem to indicate.

The words used in the original Spanish document, which counsel for the Government have translated as follows: "The line terminating at the same monument to the agricultural lands, the same being in one body," actually read as follows, when properly translated, to wit: "The line terminating at the same place or site for a monument to the agricultural land, the same being in one body."

I must convict Mr. Reynolds of this error out of his own

mouth, for at page 43 of his valuable work on Spanish and Mexican Land Laws we find the following, to wit:

"The words 'senal de mojonera' are nearly always translated wrong. Senal is a sign or mark and mojonera the site or place for a monument."

Hence we see that the word "mojonera" means "the site or place for a monument" and does not mean the monument itself; nor does it even mean the pile of stones which was usually placed as a senal or sign to mark the spot for a monument.

In every case where Leon did place a pile of stones as a senal de mojonera he explicitly stated this fact in the title papers.

We have seen that in running from the Mission church to the south center monument of the farming lands Leon states that the line terminated on the upper side, adjoining the gulch, close to the place called Calabasas, but he does not state that he placed any pile of stones there, or that he placed anything there, either as a monument or as a sign for a monument.

In running from the center of the estancia or stock farm to the north center boundary, Leon states in the original Spanish document that the line terminated at "La misma mojonera," and Mr. Reynolds has already told us that this word "mojonera" is nearly always translated wrong, and that it really means the site or place for a monument. "La" means *the*, and "misma" means *same*, and hence "La misma mojonera" means the same site or place for a monument.

We see, therefore, that Mr. Bonillas was correct in his supposition as well as careful in his examination of the title papers, and we also see that somebody is to blame for having made an exceedingly "superficial" examination of these papers for the benefit of counsel for the Government.

EAST CENTER MONUMENT, AGRICULTURAL LANDS (MONUMENT UNCHANGED). (See Photographs II and S.)

Leon says:

"Returning to the center, there was carefully measured towards the east seven cords from the river bed, the line terminating at the foot of the hill, within a mesquite grove, at which place I ordered a mound of stones to be placed as a sign for a landmark, and it was so placed." (R., p. 269.)

Mr. Bonillas testifies (R., p. 109, 110) that in looking over the valley from a small elevation to the west of the church, and at right angles to the course of the valley, he saw a mesquite grove on the east side of the valley and some hillocks or lomas just back of it. He says: "I went to this mesquite grove—it is at the mouth of a little gulch—and there I found an old monument of loose stones nearly covered up by the erosion of the waters coming from this little gulch." "That answers the description of the title papers, and I believe it is the east center monument of the grant." At R., p. 199, Mr. Flipper admits that this mesquite grove still exists at a place directly east, across the valley from said initial point or Mission church, and that back of it is a mesa that runs east and turns southerly. Mr. Flipper does not attempt to state that there is any other mesquite grove, or ever was any other mesquite grove, in that section of the country, or at any other place, that would answer the call for this monument, and he does not question, but admits, the fact that the monument exists in said mesquite grove, just as was shown by the photograph marked Exhibit II and the Exhibit marked S in the record. Mr. Colin Cameron corroborated the testimony of Mr. Bonillas at R., pp. 148, 164–'7, and Mr. Thomas Bayze at R., p. 171.

WEST CENTER MONUMENT, AGRICULTURAL LANDS (MONUMENT UNCHANGED). (See Photograph "T.")

Leon says:

"We returned to the center, taking the direction west, where was measured and counted with equal care 11 cords, the line terminating upon a long sloping hill (tendida), upon which stands the place called mesquite seco, at which point I ordered another mound of stones to be placed as a sign for a landmark, and it was so placed." (R., p. 269.)

At R., p. 110, Mr. Bonillas says:

"The west center monument is described as being about eleven cordeles in a westerly direction from the graveyard upon a 'loma muy tendida,' and that I understand to be a long sloping hillock, and on top of just such a hill I found a very large monument."

Upon being shown photograph T, Mr. Bonillas said:

"Yes, sir; I recognize that picture. It was taken after I had set up the flag for trigonometrical station. I know the photograph and I know the monument itself.

"The place where the monument is established is said to be Mesquite Seco, which means dry mesquite. Of course, I do not know what reason there was for calling it so, but it is very noticeable that the mesquite that grow out there have a dry appearance, and there are several dry ones." (R., p. 110.)

The photographs marked U, V, and W in record were identified by this witness and by the witnesses Colin Cameron and Thomas Bayze as being photographs of said mesquite near said monument (R., pp. 157, 171), and the photograph marked T was identified by all these witnesses as being a photograph of said monument itself. The age and unchanged appearance of said monument was also established by all these witnesses and its existence and ancient appearance were admitted by Mr. Flipper. (R., p. 198, 199.)

At R., p. 221, Mr. Flipper testified that the word "*tendita*" means extended or drawn out, and that it would be a proper term to apply to a mesa that was long and narrow, and that a *mesa muy tendita* might mean a long, narrow mesa; and in the same way "loma muy tendita" would mean a hill which is very long and sloping.

Hence we see that the monument adopted by Mr. Bonillas exactly fits the call of the title papers.

SIDE LINES OF FARMING LANDS.

At R., pp. 111–122, Mr. Bonillas explains why the side lines of the agricultural lands have been surveyed by him in such a zigzag course. He says:

"I was impressed by the fact that they mention in different parts of these papers that the intention was to take all the agricultural lands in the valley of the Santa Cruz river and those adjoining it, and the few cords, they say, to east and west of the valley, so from that I think it is clear that they intended to take from the edges of the valley on both sides, so as to take in these low lands or agricultural lands for farming purposes, and the woods, and so on. So I determined to make my survey so as to take in those lands literally just exactly as called for in the papers. So I established the series of trigonometrical stations on both sides of the valley and made a complete triangulation of those lands. I have my original field-notes and all my calculations with me."

"I noticed that while I went around personally with my helpers to put up the flag for trigonometrical stations—I noticed on the edge of the valley, just exactly where I would make the survey, in accordance with the calls of these papers—I found monuments on both sides of the valley, and those monuments, with very few exceptions, were old monuments. I do not remember how many, but there were a few—perhaps two or three—that were not very old, but the generality of them were old monuments." * * *

"There are about 33 or 34 of these monuments in all, and with very few exceptions they were all old monuments."

The area to which the Mission of Tumacacori was by law entitled for farming lands was *17,353.6 acres*, whereas the survey made by Mr. Bonillas only takes in *9,515.8 acres*. (R., p. 112.)

We have seen that Leon stated that the survey took in all of the agricultural land in the valley or its neighborhood besides some cords of the barren lands in the direction of the east and west. (R., p. 269.)

Hence there can be no doubt about the correctness of the survey made by Mr. Bonillas, and there can also be no doubt about the correctness of the point taken by him as the place or site for the south center monument, as the valley pinches out and ends at that place, and therefore we have thus taken all the agricultural lands in said valley, as recited by Leon.

ANALYSIS OF BOUNDARIES OF THE ESTANCIA OR STOCK RANCH.

INITIAL OR CENTER POINT OF ESTANCIA.

Leon says:

"I ordered the Governor, Juan Legarro, that, after consulting with his sons, he should proceed to point out the place desired as the center of the lands for the stock ranch or estancia, who designated the place Guebabi, including the mouth of the Potrero, this appearing most suitable for the purpose designed, as also because it had been a pueblo pertaining to this mission, where it had always kept the stock."

"Whereupon the meadow by the riverside was taken as a center, at which point I ordered a mound of stones to be placed, and it was instantly placed, to mark the central point for the commencement of the measurement," etc. (R., p. 270.)

From other parts of the title papers it is apparent that by "the place Guebabi" Leon meant the Mission of Guebabi,

and it is apparent that Legarro, who claimed that the Mission of Guebabi had been a dependency of the Mission of Tumacacori, and that its lands had belonged to that mission for a long time, and who also claimed and proved to said Leon by three witnesses that the Mission of Tumacacori owned the lands located in the Potrero and extending to the monument above the Cienega Grande, intended to point out to Leon that he desired the Mission of Guebabi to be taken as the center of the stock ranch and to have said stock ranch surveyed so as to include said Potrero as far south as said monument above the Cienega Grande. (R., pp. 272–274.)

In compliance with this request, Leon thereupon took the meadow by the river side as a center (R., p. 270). We shall presently see that he ended his survey toward the south at the Vado Seco, and that by running a line from that point parallel with the line run by Leon from the center adopted by him to the west center monument we would take in a considerable portion of the valley of the Potrero, but the lands would not extend quite as far south as said monument above the Cienega Grande.

We have seen that Legarro complained of this survey (R., p. 270), and that in making the grant the intendente permitted the lands to extend as far as the monument above the Yerba Buena as established by said witnesses, and said intendente also permitted the lands to extend on the side of the Potrero valley as far south as said monument above the Cienega Grande, and Mr. Flipper admits in his testimony that if these various points as surveyed by Mr. Bonillas are adopted as the boundaries of the grant it would be proper under the Spanish system of surveying to extend the side lines from point to point in the exact manner in which they have been extended by Mr. Bonillas. (R., p. 212.)

The ruins of the Mission of Guebabi is a well-known place and is easily identified by the remains of the old church and other houses which are still there (R., pp. 119, 68, 172), and it was admitted by Mr. Flipper that these ruins

are located at the point indicated upon said map of Mr. Bonillas. (R., p. 208.)

Witness Bonillas.

At R., p. 112 Mr. Bonillas testifiesas follows:

"After I got through with the surveys of the agricultural lands I proceeded to make a reconnoissance for the survey of the estancia, or lands for stock-raising purposes. The center of the estancia was said to have been established in 'La Vega del Rio'—that is, the meadow land or low land by the riverside, at the place called Guebabi. The place called Guebabi is very well known to me and has been for a number of years. It is not at the old Mission of Guebabi, but below the old mission, at the place very widely known as Benedict's ranch. * * * about one mile from the mission. There are old houses there, and there are some new houses there, too. The place is very well known. The old houses have the appearance of very great age. This place is about a mile down the river from the ruins of the mission in a direction about northwest."

"Exhibit X is a photograph of a monument that I built to establish my center point to put a flag."

"The description in the title papers is said to be 'La Vega del Rio, or Meadow of the Riverside.' Almost any place in front of that would answer because of the title papers, so I chose this point right in the meadow by the riverside, but close to a very noticeable, prominent clump of cottonwood trees, and I established a monument there." (R., p. 113.)

At R., p. 129, upon cross-examination, Mr. Bonillas testified as follows:

"I established a center monument at Guebabi, at the Vega del Rio. I found ruins there. There is, I believe, one or two monuments there, piles of stones, but they don't look old enough; they didn't look old enough for me, and I didn't think they were the monuments, and La Vega del Rio is very well defined." * * *

"There are little, small places of land up the river near the ruins, but La Vega del Rio—the meadow land, the best land—

is right at the place called Guebabi. In 1807 there could not have been any place up at the old ruins that would answer this description as La Vega, because the river is very narrow there at the ruins." * * *

"The title papers entirely do away with the question that the center might have been established at the ruins of the mission, because they say, in measuring from the point called Guebabi, they went towards the south, and the line terminated beyond the ruins of the ancient mission at the Vado Seco."

At R., p. 185, Mr. Bonillas testified as follows:

"I translated the words Vega del Rio as meadow by the riverside. The Spanish and English dictionaries by Velasquez, just handed me, define the word 'vega' as 'an open plain; a tract of level and fruitful ground; a mead or meadow; second, in Cuba, a tobacco field, generally by the bank of a river.'"

At R., p. 186, on cross-examination, Mr. Bonillas testified that there is a very much larger vega below the mouth of the Potrero, up near Calabasas, near where he fixed the north center monument of the estancia; that there is a very much larger vega there than anywhere else along that river.

At R., p. 186, on redirect examination, Mr. Bonillas testified that the large meadow of Calabasas to which he referred is about four miles down the river from the Mission of Guebabi.

There is a place known as Guebabi aside from the Guebabi Mission, and that the place known as Guebabi is at what is commonly known as Benedict's ranch, about a mile down the river from the ruins of the Mission of Guebabi.

And, said Mr. Bonillas—

"I understand that this place known as Guebabi and as Benedict's ranch was the principal farming lands of the Mission of Guebabi. Several persons have told me that. I remember the first time I heard it was in 1876 from Mr.

Benedict, who was living there at the time. Mr. Benedict's ranch is directly opposite the meadow which I took as the center of the Guebabi grant, and is on the west side of the river and not over two or three hundred yards away." (R., p. 187.) * * *

"There are old ditches at this place which was taken by me as the meadow, which give evidence of the fact that this place was cultivated a long time ago. I have run a line of levels for a new ditch there and have followed very much the course of the principal old ditch which runs to that place. This old ditch seems to be very old and is taken out of the river near the ruins of the old Mission of Guebabi." (R., p. 187.)

At R., p. 189, Mr. Bonillas further describes this Vega del Rio and states that a gulch runs into the river below the meadow on the east side; that the meadow is quite wide, and that on the west side of the river the bank rises to about fifty or sixty feet, and that on the east side of the river the bank rises to a height of about 75 or 80 feet; that the character of the river bed between this meadow and the Vega del Rio and the ruins of Mission of Guebabi is very narrow, with high and steep banks; the hills on the west side come right to the shore of the river, and from the east, where the ruins are, there are also high banks; these banks are of sandstone and volcanic formation.

Witness Colin Cameron.

Testifies at R., p. 191, 192, that he observed the width of the vega or meadow, which was run by Mr. Bonillas as the center of the stock farm with a considerable degree of care, and that the meadow is about one thousand yards wide.

Mr. Cameron said further:

"I had Mr. Bonillas make that survey (for a ditch to run water out upon that meadow), because we wanted to take the water out of there and get as much of this land as we could, and I paid particular attention to it on that account. This gulch comes into the river almost entirely below that

meadow, and this is the first place on the river where the water can be got onto the meadow, and the remains of the old ditch can be distinctly seen along the foot of these mesas, and the rains washing down have obliterated it in some places, but at other places it is still distinctly visible.

" Where it is taken out at old Guebabi (the mission ruins) the river has been washed out and cut maybe ten feet deeper, because you can see about eight feet where they had to cut through the stone to take it out, and the water cannot be gotten to the same level as from below, because it is so much lower down. That is the first place after you leave the old mission that the water can be taken out on the land at all."

Witness Thomas Bayze.

At R., p. 192, Mr. Bayze testifies that he is acquainted with the topography of the country at the vega which was taken as the initial point for the survey of the stock ranch by Mr. Bonillas, and that said meadow is about 1,000 yards wide from bank to bank.

On cross-examination Mr. Bayze testifies that he knows the vega near Calabasas, and that it is a very large valley down there, about a mile and a half across it. (R., p. 193.)

At R., p. 172, Mr. Bayze testifies that the ruins of the Mission of Guebabi are very well known by that name, and that the trail from Tubac to Santa Cruz runs within about 50 yards of those ruins, and that the river bed in the immediate vicinity of the Guebabi ruins is very narrow, with high rocky bluffs; that the bluffs on the east side are twenty or thirty feet high, and that the mountain comes right into the river on the west side, and that there is no meadow at that place, and that he knows the meadow of Guebabi, and that it is about a mile north and down the river from said ruins of Guebabi.

At R., p. 150, Mr. Colin Cameron testifies that he knows where the Meadow del Rio of Guebabi is, and that it is the place which was taken by Mr. Bonillas as the center of the stock ranch; that he also knows where the old ruins

of the Mission of Guebabi are, and that the mesa comes very close to the river at that point; that the ruins are on a rocky cliff, and that just beyond it, a little way up the river, there is another cliff like that, and the river is very narrow there, and that there is no meadow at all at that point, and that the meadow which was taken by Mr. Bonillas as the center is the first meadow going down the river from the old ruins, and is the first place where any water could be got on the land to farm.

"That this place was pointed out to him as the Meadow of Guebabi for the first time by Mr. Watts in Sept. or Oct., 1883."

This is the time Mr. Cameron first came into that country. (R., p. 98.)

Mr. Cameron further testified that this meadow is known by everybody as the Meadow of Guebabi. (R., p. 150.)

Witness Flipper.

At R., p. 208, Mr. Flipper testified, under cross-examination, as follows:

"Q. Now in reading the title papers of 1807, is it not your opinion that it was the intention to take the center or starting point of the estancia or Guebabi grant in the valley land near the old mission, extending down the Santa Cruz river, to include the valley lands around the mouth of the Potrero creek?

"Objected to by counsel for the Government as calling for a matter of opinion.

"A. My opinion is, after careful study of that expediente, that the estancia should include the ruins of the Guebabi, but the center should not be near the mission. *That is my opinion now.* There is nothing in the expediente which says where the center was placed, except in the vega of the river. It does not locate the vega which was taken.

"Q. At the time you made this report (a sworn report before referred to in this brief), on the fifth day of September,

1890, you then stated that it was your opinion that it should be taken as near as possible to the mission, didn't you?

"A. *I may have so stated at that time.* I have made a more careful study of the ground since then.

"Q. Do you know from the fact that the Apache Indians always caused trouble that it would have been the most natural and probable thing to have taken it as near to the mission as possible?

"A. It might have been if there had been a mission there, but those were ruins.

"By Mr. REYNOLDS: I object. This is argumentative, based on direct examination, as to his original opinion.

"Objection sustained."

It will be noticed by this Court that Mr. Flipper was in the habit of giving his opinon very freely as a witness upon questions of law as well as of facts, and that I never objected to his doing so, but permitted counsel for the Government to lead him as much as he pleased in addition.

It is a significant fact that the moment Mr. Flipper was pressed upon cross-examination for his opinion, either upon matters of law or matters of fact, the attorney for the Government quickly became alarmed.

I submit that this was a perfectly proper question to ask Mr. Flipper as an expert surveyor, for the reason that the question as to whether any grant can be located or not from the title paper depends largely upon the construction placed upon the words contained in it by the surveyor, who undertakes to locate it.

By bearing in mind the fact that the south center monument of the farming lands was already placed just above the ruins of Calabasas and close to the large meadow on the river which is spoken of by Mr. Flipper, and bearing in mind the fact that Legarro, the Governor of the Mission, was claiming that his lands extended to a point beyond and above the Yerba Buena, and bearing in mind the further fact that he desired to include the lands in the valley of the Potrero as far as the monument above the Cienega

Grande, it is apparent that when Leon, in compliance with the wishes of Legarro, selected as the center of the stock ranch "the meadow by the riverside" he must have meant some place which was very well known by that designation or name at that time. What place is more likely to have been known as the meadow by the riverside, when talking of the ruins of the Mission of Guebabi, than the meadow lands which had always been cultivated by the natives of said Mission of Guebabi, and which are the first agricultural lands below the mission which can be irrigated by a ditch taken from the river? History tells us that these missions had great trouble in maintaining themselves against the savage Apaches, and it is natural to suppose that those in charge of the mission would select the nearest available lands for farming purposes, and we have seen by the foregoing testimony of witnesses that this was done as a matter of fact.

The intelligence of Mr. Flipper led him to adopt this view without any question in the year 1890 in his sworn report, which he had supposed was confidential and would never see the light of day at the time he was testifying in his direct examination in this case. In assuming that Leon meant the large meadow near Calabasas as the center of this stock ranch, Mr. Flipper was simply carrying out his preconceived idea that the only way to defeat this grant is by making it appear to be indefinite and uncertain and not locatable. (R., p. 227.)

It is not reasonable to suppose that the center of the stock ranch would be placed at a point almost adjoining the south boundary of the farming lands, as it was usual under the Spanish laws in making all these surveys to adopt some point as a center and to run from that point toward each of the cardinal points of the compass, as we have already seen and as the Government admits.

But Surveyor Leon tells us that he ran a line toward the north from this meadow, which was taken by him as the

center, and that the line terminated at the same place or site for a monument which was fixed to the agricultural lands, the same being in one body, and that this line was 80 cords long (R., p. 270). We have already seen that in running from the church of the Mission of Tumacacori to the north center monument Leon went a distance of about 1½ miles, and called this distance 50 cords, and hence we are justified in believing that in running 80 cords he would at least go 2½ miles, even if he was exactly accurate in his measurements. If we adopt the meadow suggested by Mr. Flipper as the center of the stock ranch, we could not run more than one mile at the utmost from any point in said meadow on the river before reaching the ruins of Calabasas and passing beyond the south center monument of the farming lands.

It is far more probable that the meadow adopted by Mr. Bonillas is the correct one.

This is further demonstrated by the fact that Leon tells us that he ran from this same meadow 55 cords to the Vado Seco (R., p. 270), which would make the distance from the center of the stock ranch which was taken by Leon to the Vado Seco nearly one-third less than the distance from said meadow which was taken as the center point to the north center monument, which was 80 cords. By referring to Mr. Bonillas' map it is apparent at a glance that the distance from the meadow which was adopted by Mr. Bonillas as the center to the Vado Seco is almost exactly one-third less than the distance from said center point to the north center monument.

Whereas if we accept the meadow which was suggested by Mr. Flipper as the center of this stock ranch, the distance from that point to the north center monument would only be about one-tenth part of the distance from said center to said Vado Seco, which place is so very well known that no mistake could possibly have been made as to its location (R., pp. 68, 80, 174), and the location of which, furthermore,

has been admitted to be correct by the Government and by the testimony of Mr. Flipper, whereas Leon tells us that he ran 80 cords to the north center monument and only 55 cords to said Vado Seco.

It will also be noticed that the surveyor Leon, at page 271 of Record, states that the Potrero lies in the direction of the west from the center monument of the stock ranch, and an inspection of Mr. Bonillas' map will at once show that the Potrero does lie in the direction of the west from the meadow taken by him as the initial point or center of the stock ranch, whereas it lies almost directly south of the meadow suggested at the present time by Mr. Flipper as the center of the stock ranch, but which was never thought of by him at the time he made his sworn reports in 1890 for the benefit of himself and other squatters.

It seems to the writer, therefore, that it is conclusively established by the evidence that the meadow taken by Mr. Bonillas as the center or initial point of the stock ranch is the exact place which is called for in the title papers of 1807.

NORTH CENTER MONUMENT (STOCK RANCH).

Leon tells us at R., p. 270, that "being at the initial point designated of their land, and placing the compass, properly adjusted, a direction was taken to the north, in which direction were measured 80 cords, which was carefully measured and counted, the line terminating at the same place or site for a monument fixed for the agricultural lands, the same being in one body."

Mr. Bonillas tells us at R., p. 113, that "the title papers said that the north center monument of the estancia was exactly the same point where the south center monument of the agricultural lands was; and it furthermore states that the agricultural lands and the lands of the estancia, or lands for stock-raising purposes, formed one body. So I took the same point as the north center monument of the estancia."

SOUTH CENTER MONUMENT (UNCHANGED. STOCK RANCH).

Leon tells us, at R., p. 270, that—

"Returning to the center, the direction was taken to the south, in which direction were measured and counted, with equal care, 55 cords, the line terminating on the very slope which descends into the lowlands or water-course that runs toward the Vado Seco (dry ford or crossing), where I ordered another mound of stones to be placed as a landmark, and it was so placed," etc.

Witness Bonillas.

At R., p. 113, Mr. Bonillas testifies as follows:

"The south center monument is said to have been established on the very slope which descends into the lowlands or water-course that runs towards the Vado Seco ahead of the town or ancient Mission of Guebabi. The point in the Santa Cruz river called the Vado Seco or dry ford is a well-known point; so I went to this Vado Seco, and it is very remarkable that a very wide water-course—wash—flows right at that point of the river, so I went up that water-course and I looked for the monument on the edges of the valley there, and right close to a place where the old trail used to pass by I was told by some old people that were with me (among them Don Jesus Maria Elias and people who knew that country very well) that in those old times they did not travel along the valley very much. They always went on the edges, and this was the old trail from Tubac and Tucson to Santa Cruz, and on the slope there descending into this wide water-course which runs to the Vado Seco, exactly in accordance with this description, I found a very old monument of loose stones."

The witness then identified the photograph marked Exhibit Y, which is in the record as being a photograph of said Vado Seco or dry ford or river crossing, and he also identified the photograph marked Exhibit Z, which is in the record as being a photograph of the old monument just de-

scribed by him as being on the edge of the slope where it descends into said water-course or dry ford. (R., p. 114.)

Witness Flipper.

At R., p. 201, Mr. Flipper states that the monument at the Vado Seco is properly located on the map of Mr. Bonillas; but he attempts to weaken the force of this admission by stating that in crossing the river as you rise the mesa on the other side is another pile of stones, but that it is not a large one.

At R., p. 225, however, Mr. Flipper admits, under cross-examinatien, that this small pile of stones referred to by him on the opposite side of the river is simply one of those little piles of stone that he has seen in thousands of places in mountain passes and streams to mark the place where the trail comes out of the river on the other side so that a traveler will not get lost, or to mark the place where one trail turns off from another.

This testimony was only dragged out of him, however, by leading questions, and I respectfully invite the attention of this Court to the contrast between the statements of this witness under his direct and under his cross-examination as being one more exhibition of the want of good faith displayed by this special agent of the Department of Justice in testifying as a witness upon this case.

At R., pp. 152, 153, the witness Collin Cameron corroborates the testimony of Mr. Bonillas in his description of the Vado Seco and the monument in photograph, Exhibit Z.

At R., p. 153, Mr. Cameron states that the Vado Seco "is just a low place or dry place in the river, no water flowing there except in flood time. The river is very wide and the sand is deep there, and the wagon road crosses the river at that particular place—the Santa Cruz wagon road."

Mr. Cameron states further that this place has always been so.

At R., p. 174, witness Thomas Bayze states that—

"He knows the place called Vado Seco; that it is a crossing of the river, a dry ford, and that it is dry all the year, except when there is a freshet in the river from the rainy season, and that he first saw the monument represented by photograph, Exhibit Z, in the year 1890, and it had a very old appearance, and that it is east of the old Santa Cruz trail, right on the side of it, about 100 feet away."

Witness Jesus Maria Elias also identified Vado Seco and monuments. (R., p. 68.)

WEST CENTER MONUMENT (STOCK RANCH).

Leon tells us at R., p. 271, that, starting at the initial point—

"A direction was taken to the west, in which direction were measured carefully and counted 38 cords, the line terminating on the slope of the highest hill seen from the Potrero, at which point I ordered to be placed and there was placed another mound of stones; whereupon the measurements were concluded as well of the agricultural lands as of the two sitios of estancia (stock rancho) to the satisfaction of the officers," etc.

It will be noticed that Leon refrains from stating that these measurements were concluded to the satisfaction of any other person or persons than the officers; and we see from the title papers that Legarro, in representation of the petitioners for whom the lands were being surveyed, protested against the survey and insisted that the lands should be extended to the south, beyond the Yerba Buena, to the monument described in the testimony of the witnesses as being on the boundary of the Buena Vista grant, which belonged to the Romeros, and said Legarro also protested that the lands should be extended on the side of the valley of the Potrero as far as the monument above the Cienega Grande. (R., p. 272.)

Witness Bonillas.

At R., p. 119, Mr. Bonillas testifies as follows:

"The west center monument is described in the title papers as being situated on the caida, or fall it would be; that would be the literal translation, the descent or fall or slope of the highest loma—that is, the highest hillock that can be seen from the Potrero. Now, you cannot see either the Potrero or any rolling hills that extend to the west of it from the center monument of the estancia at Guebabi at this meadow, but by following a westerly direction at right angles to the course of the valley in an opposite direction to the east center monument there is a gulch that runs up to some high lands lying between the valley of the Santa Cruz and the valley of the Potrero, and by following this gulch up you come to the high lands, and there another gulch rises that runs towards the Potrero, and there you can see further; you can see this Lomerio or these rolling hills extending to the west, and going down that gulch you come to the Potrero, and you follow to the west and come to this highest loma described in the title papers. On the top of this loma there was a large monument, and on the caida or slope or descent of this loma there is another monument, and this I considered as the west center monument of the estancia. This loma is quite noticeable. It rises above the rest of the rolling hills and is quite a noticeably topographical feature."

The witness identified Photographic Exhibit G 5 as being a photograph of the monument that stands on the top of said loma, and he also identified the photograph in Exhibit H 5 as a photograph of the monument taken by him as the west center monument of the estancia. (R., p. 120.)

Witness Flipper.

At R., p. 200, 201 Mr. Flipper admits on his direct examination that these two monuments exist, as described by Mr. Bonillas, on the highest loma seen from the Potrero, and that the monuments are old.

Witness Collin Cameron.

At R., p. 154, Mr. Cameron testifies that "he knows the location of the west center monument of the stock ranch; that it is on the highest loma that you can see from the vicinity of the Potrero; that he has seen this hill many times from the Potrero, and that there is not the least difficulty about distinguishing which is the highest hill; that he first saw this monument in 1890, and that it is a very old monument, and lies just on the slope of the hill in about the length of the court-room from the top of the hill."

At R., p. 233, Mr. Cameron says, on cross-examination:

"By Mr. REYNOLDS:

"Q. Now, you take a high monument—four or five feet high—down which the water runs to its base, washing away from its base the dirt, and you say the tendency has been to cover them up, whereas ordinary stones imbedded in the ground are being exposed by the elements?

"A. Yes, sir. Take the west center one of this estancia—it is on the slope where the hill levels a litle bit—and the photographs will show you that the debris comes down off the hill and has washed away from some of the natural piles of stones, and if you go there anybody can tell that this particular pile of stones was put there and the others were not."

Witness Thomas Bayze.

At R., p. 176, Mr. Bayze testifies that he knows the west center monument of the stock ranch which was taken by Mr. Bonillas; "that it is west of the old Potrero ranch on the highest ridge looking toward the Pajarita mountains, on the side of that hill; that when he first went to work on this ranch he made his headquarters right in the Cienega Grande, in the house that is on the point of land that is in the Cienega Grande."

EAST CENTER MONUMENT (MONUMENT UNCHANGED). (STOCK RANCH.)

This monument is described in the title papers by the witnesses in 1807. (R., pp. 272 274.)

Surveyor Leon says, returning to the center (the meadow by the river), "a direction was taken to the east, in which direction was carefully counted and measured 27 cords, the line terminating at a hill (serro), and it being impossible to proceed further in this direction on account of the ruggedness of the country, whereupon the parties interested asked me to give them the remainder of the cords in the direction of the Potrero, which was on the west, and consenting to their request as reasonable, I ordered to be placed, and there was placed, at the foot of said hill (serro) of San Cayetana, on the side looking towards the south, another mound of stone as a sign for a landmark," etc. (R., p. 271.)

Witness Bonillas.

At R., p. 115, Mr. Bonillas testifies as follows:

"Next I went to look for the east center monument. It is described in the field-notes of the original survey as being erected at the foot of that side of the San Cayetano which looks toward the south, the survey not being extended any further in an easterly direction on account of the roughness and inaccessibility of the country, and for the further reason that the grantees petitioned the person who was making the survey to add on the western or Potrero side the rest of the lands to which they were entitled on the east. When I read the description I was very much confused, the place called Guebabi being at a considerable distance up the river from Old Calabasas, which is mentioned in the survey of agricultural lands. The Cerro de San Cayetana that I have known is a range of mountains which lies east of these agricultural lands and I would say, yes—almost east of the starting point of these agricultural lands of the Tumacacori Mission (*i. e.*, of the old Tumacacori church). So

when I read that description I said, 'This must be a mistake. That cannot be the mountain which these people meant to describe, where the east center monument of the estancia was established.' Furthermore, I was led to that belief by the fact that in the description they say that they run so many cordeles (37, I believe) in an easterly direction from Guebabi, and that measurement terminated at a cerro. They do not speak of the San Cayetana mountain there. Then they go on and say that they could not go ahead on account of the roughness of the country; and, furthermore, the surveyor was petitioned to extend the survey to the west or the Potrero side as many cordeles as he had failed to go to the east, and then, having established the monument at the foot of the Cerro San Cayetana, they returned to the center. At first they do not mention the cerro, and I think they mention it incidentally. I do not believe they meant what is known as the Cerro de San Cayetana, because it is an absurdity.

"The Serro of San Cayetana is a little west of north and quite a distance from Guebabi, and they were going east. They went at right angles to the course of that valley.

"The title papers say that the north boundary of this stock ranch is on the south boundary of the agricultural lands, and that north boundary point of this stock ranch is already quite a distance south, or a little east of south, of that chain of mountains called San Cayetana."

The witness further stated that from his experience in making surveys in Mexico and from his general knowledge of the Spanish language he defined the word cerro as a hill or as a mountain of not very great size. (R., p. 116.)

At R., p. 117, Mr. Bonillas says:

"There is another description given to the point where the lands of this estancia reach, and that is in the declaration of these witnesses. They say that the monument on that side was at the Sonoita cañon, upon a mesa mui tendida. I translate that, and from the knowledge I have of the descriptions given in so many title papers, I call that a very gradually sloping mesa.

"The word tendida means spread out, as you find the word isolated; without referring to any object; stretched out."

"I was going to say that description I found in some points agrees to a certain extent with the description by the witnesses and that by Surveyor Leon, and I made up my mind that they (the surveyors) did not measure thirty-seven cordeles up to that point, but they simply took a description of the place where this monument was located and said, Well, so much is there and we will let it go for so much; and I went in an easterly direction from the center, following the wide wash or gulch that flows into the river of the valley just above that point of the river valley, and I followed that to the east. I followed that with the direction of that gulch and I looked for a monument, and I didn't find anything that I would call a cerro for a long distance from the valley. There is a series of long, bald ridges which I would call 'cuchillas' or 'lomerio,' but not one of the cerro till I came to the edge or banks of the Sonoita cañon, and there I found some pretty rough country, and there on the edge of the Sonoita cañon and there I found what I would probably call a cerro, and there close to this cerro and descending very gradually towards the valley of the Santa Cruz there is a mesa, as they describe as a mesa 'muy tendida,' and on the edge of the mesa and on the side to the south of this hill, there being between the mesa and the hill a slight depression, there I found a very old monument which, in my estimation, answers the calls of the title papers, and I accept that as the east center monument.

"The mesa I speak of is rather narrow, in the sense that it extends towards the Santa Cruz valley. It properly ends on the side where the monument is, and traveling from there in the direction of Guebabi, it ends there where the gulch forms a cañon; then you have afterwards some low land, and after that cañon you come right from the mesa and follow the gulch and you come to the center point where they started this survey. The mesa runs straight down there," says Mr. Bonillas. (R., p. 117.)

At R., p. 119, Mr. Bonillas says:

"From this monument going east the country is very rough hills, and the titulo says they didn't go any further because the country was very rough.

"The cerro I speak of looks something like a truncated

cone. It is rounded up on top and the hill is circular or round. It is joined onto this mesa on the edge of which this monument is, and then it descends abruptly towards the Sonoita cañon, and it is cut off from the rest of the hills. It stands alone, just connected with the mesa, the edge of the mesa forming the water-shed between the Santa Cruz valley and the Sonoita cañon. It rises to a considerable extent above the mesa on the mesa side."

At R., p. 133, the witness identified Exhibit E 5 as a photograph of said serro.

Exhibit F 5 was identified as a photograph of said east center monument taken from above the monument and looking down the mesa, and Exhibit D 5 was identified as a photograph of said east center monument taken from on a level with the monument.

At R., p. 134, Mr. Bonillas stated that he knew where the San Cayetana mountains were at the time he was running this line, but knew there was no sense at all in going to the Serro San Cayetana, as it was an absurdity, and he therefore struck the words of "San Cayetana" out of the description and ignored those two words in making his survey.

Witness Thomas Bayze.

At R., pp. 173 and 177, Mr. Bayze corroborates the testimony of Mr. Bonillas as to the topography of the country, from the center monument to this east center monument and the existence and location of said monument, in every particular.

Colin Cameron.

At R., p. 150, Mr. Cameron states that he knows the east center monument of the stock ranch, and that it is close by the Sonoita cañon, at the edge of a mesa and just behind or in front of a big hill, close to the place known as Sanford's Station, in said cañon; that the Sonoita cañon all the

way up and down is very narrow; that all along the cañon it used to have trees in it; that he read in Barrett's History of the Boundary Survey that when he attempted to go down that cañon he failed; that they undertook it and could not get through with their teams and had to go by way of the Babacomari and the Canailla and by way of Santa Cruz.

The writer desires to call attention at this point to the fact that in order to proceed westward with the boundary survey by going around by the way of Santa Cruz it was necessary to travel a very great distance, to wit, at least 100 miles, out of their way in order to get into the neighborhood of Guebabi and Calabasas and Tubac before proceeding and in proceeding with their survey toward the west. This fact alone ought to conclusively establish the fact that the pile of stones taken by Mr. Bonillas as the east center monument of this stock ranch precisely and exactly fits the statement made by Surveyor Leon that he did not proceed further toward the east from said point "on account of the great roughness and inaccessibility of the timber and abruptness of the hills."

We see that the description of the country adjacent to the San Ceyatana mountains given by Mr. Flipper does not fit the description of the place taken by said Surveyor Leon as the east center monument of said stock ranch, as Mr. Flipper himself states that it is not heavily timbered, and in reaching those San Ceyatana mountains from any possible direction the country might be rough, but it is clearly not "precipitous."

The word precipitate is defined by Webster as meaning to throw headlong; to fall or cast to the bottom. The word precipice is defined as any steep descent. It will be noticed that it is applied to a "descent" as distinguished from an "ascent." The word precipitous is defined as very steep, abrupt.

Mr. Flipper admits that you reach the pile of stones taken by Mr. Bonillas as the east center monument by traveling

over a mesa mui tendida from said meadow taken as the center of the stock ranch, and that when you reach this east center monument and the big hill or serro you are on the edge of the Sonoita cañon, and that the country is very precipitous immediately beyond that toward the east, dropping into said Sonoita cañon by a steep descent down which it would be almost impossible to take a horse. Hence it agrees perfectly with the description of Leon if we accept the corrected translation which the learning and intelligence of Mr. Flipper has presented for our consideration as the correct one.

Witness Flipper.

At R., p. 195, Mr. Flipper states that he translates the description of the survey of the east center monument of the stock ranch by Surveyor Leon as follows, to wit:

"I placed myself at the point pointed out for the center of these lands, and, having set up the compass in good adjustment, a wind to the east was taken along which they went, measuring and scrupulously counting 27 cords, which terminated on a hill, and it being impossible to advance further on account of the great roughness and inaccessibility of the timber and abruptness of the hills, the parties in interest requested that the remaining cords be given them in the direction of the Potrero, which is in the direction of the west, and, agreeing with this application as regular and admissible, I ordered placed, and there was placed, at the foot of said serro San Cayatana (hill), on the side that looks to the south, another pile of stones to make the place for the monument."

The only change which has been made by Mr. Flipper from the original translation as found in the record is to add the words "inaccessibility of the timber." The remainder of the translation is substantially the same as that given by Mr. Bonillas. The testimony of Mr. Colin Cameron, just preceding, on this point, shows that this change which was made by Mr. Flipper in the translation for the obvious pur-

pose of making the points taken by Mr. Bonillas for the east center monument seem to fit the description given in the title papers with less exactness, does not accomplish said purpose, but that, on the contrary, this improved translation makes the place adopted by Mr. Bonillas fit the description given in the title paper with even greater preciseness and accuracy as to minute details than it did before, if such a thing is possible.

At R., pp. 196, 197, Mr. Flipper translates the testimony of the witnesses in regard to this east center monument and the monument beyond the Yerba Buena and the monument above the Cienega Grande in exactly the same language which appears in the translation of their testimony in the title papers at R., pp. 272, 273.

At R., p. 203, Mr. Flipper identifies Exhibit E 5 as a photograph of "the top of a big hill by the Sonoita cañon; it is a little west of north—not certain whether east or west, but it is north of the east center monument of the estancia (stock ranch)."

"That is the large hill which lies to the north of the present location by Mr. Bonillas of the east center monument."

In other words, Mr. Flipper states that the pile of stones taken by Mr. Bonillas as the east center monument lies "on the side that looks to the south" of said "big hill by the Sonoita cañon;" which corresponds exactly with the description given by Leon of the place where it was put.

At R., p. 203, Mr. Flipper identifies D 5 as a photograph of the pile of stones taken by Mr. Bonillas as the east center monument.

At R., pp. 203–'4, Mr. Flipper testifies that the old wagon road to Fort Crittenden runs up the big dry gulch toward the northeast from Guebabi and strikes a ridge and then runs nearly southwest of this east center monument along the foot of this ridge to a point a little over a mile from said

east center monument and then runs around said big hill on the east side of it and into the Sonoita valley.

At R., p. 204, the following question by Mr. Reynolds and answer by Mr. Flipper, respectively, occur:

"Q. Would there be any difficulty in surveying a line over across there (from the east center monument on toward the east into and across the Sonoita valley, the direction in which said Surveyor Leon was proceeding at the time he stopped on account of the inaccessibility of the timber and precipitousness of the hills) on account of the inaccessibility of the timber and hills, and so on?

"A. No, sir; you have gone over all the rough country when you get to this point (*i. e.*, coming from the meadow taken as a center by Mr. Bonillas and running to the pile of stones taken by him as the east center monument). There would be no difficulty in the world (*i. e.*, in proceeding on from that east center monument into and across said Sonoita cañon with a survey). That section of the country from here on and from the center of the estancia up to this point is not one-tenth as difficult and rough as that from the same center monument of the estancia to the west monument. The foot-hills of the Benedict mountain there is about as rough a piece of country as there is in southern Arizona. It is broken up with gulches and is rocky." * * *

"I know the mountains of San Cayatana, which are north of the mouth of the Potrero (at old Calabasas, the north center point of the stock ranch and south center point of the agricultural lands)."

"The condition of the country around the foot of those San Cayatana mountains is rough and broken. It is not heavily timbered, but when you get into the foot-hills there is quite a quantity of mesquite and catclaw. As compared with the country over at the east center monument, it is much more rugged and inaccessible and much more precipitous."

At R., p. 210, Mr. Flipper admits, under cross-examination, that to run a line toward the east from either the meadow at the mouth of the Potrero, near Calabasas, which is suggested by himself as the center of the stock ranch which was taken by Leon, or from the meadow which was

taken by Mr. Bonillas as the center, would be "absolutely impossible," and that the San Cayatana mountains "are north of the old ruins of Calabasas," and that the meadow suggested by himself as the center point is inside of the southern end of our map of the farming lands of Tumacacori, and that therefore to run north from that point for the purpose of getting your stock ranch would be an impossibility, as it would be simply taking in what you already had.

At R. p. 220–'1, Mr. Flipper testified as follows:

"Q. The word tendida is also used to mean extended or drawn out, is it not?
"A. Yes, sir; it is.
"Q. And it would be a very proper term to apply to a mesa that was long and narrow?
"A. It would.
"Q. A mesa mui tendida might mean a long, narrow mesa?
"A. A very long and narrow mesa; yes, sir."

At R., p. 224, Mr. Flipper testified, under cross-examination, as follows:

"Q. Have you ever traveled from that monument (the pile of stone adopted by Mr. Bonillas as the east center monument of the stock ranch) down to Guebabi (the meadow of Guebabi which was taken by Mr. Bonillas as the initial or center point of the stock ranch)?
"A. Yes, sir; but not in a direct line.
"Q. You never went down that mesa?
"A. Not all of it; no, sir.
"Q. From where the mesa begins, as far as you can see, could not a man drive easily with a team of horses and wagons?
"A. On that mesa?
"Q. Yes, sir.
"A. Undoubtedly.
"Q. Or with a buggy?
"A. Yes, sir; he could.
"Q. And that would drop into the cañon at the end of

that mesa about one-half or two-thirds of the way down to Guebabi, would it not?

"A. It would; yes, sir.

"Q. Is it not very easy to drive a team up this cañon and then turn off another cañon that turns to the left and drive clear right straight up to within a quarter of a mile of this monument?

"A. Yes, sir.

"Q. With a team?

"A. Yes, sir.

"Q. And you call that very rough country?

"A. That is just what I say—that it is not rough.

"Q. Didn't you say that the country between this monument, the east center monument, and the Benedict ranch was about the roughest in that whole section of country?

"A. No, sir; I did not. I said the country from the center of the estancia. I especially took pains to say that the foot-hills of the Benedict mountain was the roughest part in southern Arizona, and if you will have my testimony read you will see that I said that.

"Q. I misunderstood you.

"A. The country you have just been talking about, going to the east center monument (from the meadow taken by Mr. Bonillas as the center of the stock ranch), we drove over ourselves in a carriage.

"Q. After you get up there does not the country become much rougher?

"A. Going down it is more precipitous.

"Q. It would be impossible to go down from that end of the mesa?

"A. It would be impossible with a wagon; yes, sir.

"Q. And almost impossible with a horse, wouldn't it?

"A. Yes, sir; it is precipitous.

"Q. And after you get down there the cañon is all broken up?

"A. Yes, sir; it is full of gulches, but you can get around down there better than you can come down.

"Q. Yes. In traveling around surveying at the end of the day's work, after you have been over a smooth mesa like that, it would look pretty rough down there, wouldn't it?

"A. It would; yes, sir."

It seems to the writer that the appellant could safely rest the location of said east center monument upon this cross-examination of Mr. Flipper alone.

Exactly how Mr. Flipper reconciles his statement on cross-examination, "That is just what I say, that it is not rough," in referring to the country between the center monument and the east center monument, with his statement upon the direct examination by Mr. Reynolds, that when you reach the east center monument as taken by Mr. Bonillas "you have gone over all the rough ground when you get to this point," and "there would be no difficulty in the world" in proceeding on toward the east from that east center monument into and across said Sonoita cañon, is more than this writer can understand.

MONUMENT BEYOND THE YERBA BUENA (HARRIS' MONUMENT, AND PRACTICALLY UNCHANGED). (STOCK RANCH.)

This monument depends for its location upon the testimony of the witnesses, as found in the title papers of 1807. (See R., pp. 272–274.)

The testimony of these witnesses appears under the evidence set forth by me in establishing the east center monument of the stock ranch.

Witness Bonillas.

At R., p. 114, after completing his statement about the location of the monument of the Vado Seco by Leon's survey, Mr. Bonillas says:

"The title papers state, furthermore, that after this monument was established there (at Vado Seco) and the other monuments that they (the Surveyor Leon) did establish that the parties interested in having this survey made said that the lands of their mission extended further south, and that they could prove that, and that they wanted the rest of the lands that they had owned and that had been paid for

by moneys belonging to the mission, and so the declarations of three witnesses were taken, and these witnesses testified that these additional lands extended to a place beyond the Yerba Buena, a point well known on the river, and to the boundary line of the ranch at Buena Vista, then belonging to the Romeros. I went up the river to Yerba Buena and from there further up, and I was shown this monument, and I found a very old monument there with a stake mark, no doubt by an American surveyor, and I found it had been marked by Mr. Harris, who I believe to have made a survey and had adopted that as the south center monument of the Guebabi and Calabasas (this grant).

"I understand that this survey by Mr. Harris was ordered by the Surveyor General at the time he recommended the confirmation of the grant."

The witness then identified the photographs, Exhibit A 5 and Exhibit B 5 and Exhibit C 5, found in the Record as photographs of said monument, and said:

"The stake (of Mr. Harris) is in the old monument and I did not want to disturb its appearance, so I set my trigonometric point just on one side of it and put new rocks there, and that is where that flag shows in the photograph."

"Q. You say an old monument. Now, how old a monument do you mean?

"A. Well, that monument might be 100 years or might be 200 years, for all I know. In its appearance it seems to be a very old monument. The rock is weathered and you see it disintegrated, and you see the base of it covered by sand. Some of the rocks—large rocks—pretty well covered and some of the rocks are weathered—have a kind of moss on them.

"Q. Did you study geology any?

"A. Yes; I had to.

"Q. Did you take a course in geology?

"A. Yes, sir.

"Q. From the appearance of this monument, where would you say the rocks came from?

"A. It is built of granite rocks.

"Q. Where did they come from?

"A. Right from the ridge where the monument is. It

seems to be the general formation of that section of the country there.

"Q. Might not that monument have been built there by Mr. Harris originally?

"A. It is not possible that it was, because I understood that Mr. Harris had made a survey some time in the 70's—that is, some years previous, but I don't know exactly how long—and if he had built that monument the rocks would show it. The marks on the rocks would show it.

"Q. Marks for what?

"A. The water marks. The rocks are in the ground and when they are picked up the water marks remain on them for years and years. I have seen a monument that I built in 1883 and 1884—monuments—and I have seen them within the last five or six months and they are standing just as I built them, and the water marks are there, and they are 10 or 12 years old.

"Q. Now, by the term old monuments, as used by you in each instance of which you have spoken of monuments being old, what did you mean by that?

"A. I meant such monuments as I have described here—old monuments of loose stones that have every appearance of age, covered by sands at the base, and in some instances trees or shrubs growing in them, and the rocks are weathered, and you see the position of the rocks has not been disturbed. You pick up a rock and you see the marks—the shade is different from the other rocks, and the contact, and you notice that it is old." (R., pp. 114, 115.)

At R., p. 130, Mr. Bonillas testified, under cross-examination, as follows:

"(By Mr. REYNOLDS:)

"Q. So you took, in making your survey and in fixing that south center monument—you took the testimony of those witnesses that had been taken before the survey was made, in 1807, and substituted it for that survey, did you?

"A. I did not take it because this testimony had been taken before or after the survey, but I took it because in the granting clause of this title the title is granted to the lands included in the survey and the additional lands petitioned for, whether the testimony was taken before or not, and that is the reason I took it."

Witness Flipper.

At R., pp. 202 and 203, Mr. Flipper testified, on direct examination, that the photograph, Exhibit B 5, is a photograph of the south center monument of the estancia, and that the top of this monument has been built up.

At R., p. 222, on cross examination, upon the photograph B 5 being handed to him, Mr. Flipper testified that it is a photograph of the south center monument of the stock ranch, and that this monument is commonly known as Harris's monument. The following questions and answers were then given to and made by said witness:

"Q. You stated that there was some change in that monument (Harris's monument), that some rocks had been moved, as I understand you?

"A. No; I say the base of the monument appears to be old, and the rock on top appears to have been placed there afterward. I don't mean to say the monument has been varied.

"Q. As to the rocks placed on top, aren't the rocks only immediately surrounding the poles—those shown on the left-half side of the photograph, excepting the part to the right-hand side, to the mesquite pole there—in the original condition in which it was?

"A. To the best of my recollection, the only new rocks on that monument are those.

"Q. Those to the left?

"A. Just the top?

"Q. Yes; those to the left-hand side on the top.

"A. Yes, sir.

"Q. The right-hand side of the monument would be in its original condition, then?

"A. Yes, sir; that is what I meant to testify."

Counsel for the Government seemed to have found considerable amusement in referring to the many changes which were made in the monuments of this grant before the photographs which are in the record were taken; but the testimony shows that this monument above the Yerba

Bueno and the monument above the Cienega Grande are the only ones upon which any rocks have been changed or moved, and the testimony of Mr. Flipper in regard to the changes of this monument is a fair sample of his testimony throughout this case, and we shall presently see that the change in the monument above the Cienega Grande was of almost the same insignificant character as the change in this one.

The witness Colin Cameron identifies this monument at R., pp. 153, 154.

The witness Thomas Bayze identifies this monument at R., pp. 174, 175.

The witness Jesus Maria Elias identifies this monument at R., pp. 68, 69.

MONUMENT ABOVE THE CIENEGA GRANDE.

This monument is also described in the testimony of the witnesses in 1807, at R., pp. 272–274.

Witness Bonillas.

At R., p. 120, Mr. Bonillas testifies as follows:

"The title papers, besides these monuments that I have described, in the declarations of these three witnesses it is stated that there is another monument besides these cardinal monuments I have described, and on the Potrero side—that is, to the south—the lands reach or extended to a point above the Cienega Grande or above the large marsh. This large marsh of the Potrero is very well known now and used to be much better—used to be much larger than it is today because a great deal of it has dried up, as I have heard from a great many old people who have traveled through there. Above the Cienega Grande they say there stood a monument there in that place, so I looked for it, and I thought I found the identical monument that they referred to—a very large monument to the south of the Cienega, on the low hills that stand to the south and, as you might say, beyond or above the Cienega Grande."

Being shown two photographs, Exhibits I 5, which appear in the record, Mr. Bonillas said:

"Yes, sir; that is the monument above the Cienega Grande. I think some rocks have been picked up around here that were fallen down and have been put on top of it; but the base is all there, and you can see that it is a very old monument just from the base of it."

It will be noticed that Mr. Bonillas very frankly called attention to the change in this monument upon his direct testimony.

Witness Flipper.

At R., p. 202, Mr. Flipper testifies on direct examination as follows:

"Photograph I 5 is a photograph of the monument above the Cienega Grande that has been piled up. I have seen it when it was much smaller than it is here.

"I think the first time I saw it was about 1887. It was not as large as that then. The top was not on it."

On cross-examination, at R., pp. 205, 206, Mr. Flipper says:

"I did not say that I saw any of the monuments prior to this time (February 19, 1894) except the one above the Cienega Grande. That was shown to me by Mr. Charles Altscher, who claimed a tract of land which he said was between the Calabasas and Nogales, and he took me out there and showed me that monument and told me it was the monument of the Calabasas grant. At that time I knew nothing whatever of the Calabasas grant."

"I have read the title papers of the Nogales grant."

"Q. Don't they state that there is about 1,000 feet between the north monument of that grant and the south monument of the Calabasas grant?

"A. 1,000 steps, it says. At that time I had seen none of the papers in either case—that is, of either grant."

Witness Collin Cameron.

At R., pp. 153–'4, Mr. Cameron testified, upon direct examination, as follows:

"I know the monument above the Cienega Grande and have known it since 1890. It was an old, old monument, fallen down, the first time I saw it. It was an old, old monument, with stones that are now piled on top of it lying at the base of it, and more than half covered up in the earth, as the present appearance will show they were pulled out of the ground; but the base of the old monument there now shows that it is an old monument and sunk in the ground."

It will be noticed that this witness also frankly stated the condition of this monument, as to changes in it, upon his direct examination and before Mr. Flipper had been upon the stand. This is the only monument on which any of the stones have been moved except the Harris monument, just before described. (R., p. 154.)

Mr. Cameron testifies at R., p. 162, that about one-third of the top of this Cienega Grande monument is new, and consists of stones which were lying around the base of the monument and which he placed on the top of it, so that he would be able to see the monument from the public road, which runs close by.

Mr. Cameron was manager of this ranch for the appellant at the time he piled these stones on top of said monument.

The witness Bayze identifies this monument at R., p. 175.

The witness Jesus Maria Elias identifies the Cienega Grande of the Potrero as a place known by him by that name "since he arrived at the age of reason and could pronounce names, to mention them" (R., p. 69.) It will be remembered that this witness was born at Tubac and lived at Calabasas until 1835. (R., p. 61.)

No single one of the hundred or more squatters who are

on this grant disputed the fact that each and all of the places taken by Mr. Bonillas as being the places called for in the title papers are well known to the present day by these names, and that they are located at the points designated upon said map of Mr. Bonillas, or that the monuments or piles of stone described by him as representing the boundary points of this grant exist at those points and are unquestionably of ancient origin.

In the case of *U. S. vs. Hancock*, 133 U. S., 193, speaking through Justice Brewer, this Court said:

"It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, 'a little more or less,' which amount was very much less than that included within the boundaries."

Respectfully submitted that the validity and the boundaries of this grant are fully established.

Respectfully submitted.

FRANCIS J. HENEY,
Attorney for Appellant.

No. 119.

Add'l Brf. of Keney for Appts

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Mar. 19, 1898.

No. 119.

WILLIAM FAXON, JR., TRUSTEE, ET AL., APPELLANTS,

vs.

THE UNITED STATES, GEORGE W. ATKINSON, ET AL.

ADDITIONAL BRIEF FOR APPELLANTS.

LOUISIANA RULE ON CONSTRUCTION OF GRANTS.

Filed by leave of the court.

The rule of construction by which it must be determined whether a grant is one of quantity or one of specific boundaries, under the Spanish laws as applied in Louisiana, is exactly the same as the rule of the common law as laid down by this court on the same question.

That rule is well expressed by Mr. Chief Justice Marshall in the case of McIver *vs.* Walker, 9 Cranch, 173, holding that if marked trees and corners be found conformably to

the calls of a patent, or if water-courses, mountains, or other natural objects be called for, distances must be lengthened or shortened and courses varied so as to conform to those objects.

Article 2470 of the Louisiana Code provides that if the quantity sold comes short of the quantity expressed by one-twentieth, the purchaser can recover the diminution if the sale was not *per aversionem* (*i. e.*, if the sale was not by specific boundaries).

In *Boyce vs. Cage*, 7 An., 672 (La.), the supreme court of Louisiana says:

"To constitute a sale *per aversionem* (*i. e.*, by specific boundaries), there must be either a distinct or separate object described, such as the Manor of Dale, an island, an enclosed field. A sale is also considered *per aversionem* when it is for a total sum, and assigns to the land sold existing visible boundaries, such as rivers, highways, fences, *pieces of stone*, iron, or wood, showing the starting point and direction of the dividing line with the adjoining tenements. These last sales are held to be *per aversionem* on the presumption that the parties to them have their attention fixed rather upon the boundaries than the enumeration of quantity."

Citing *Fisk vs. Fleming*, syndic.

This rule has been universally followed by the supreme court of Louisiana.

The case of *Hoover, tutor, vs. Richards and Wife*, 1 Robinson, 34, which was referred to by Mr. Justice White upon the oral argument of this case as apparently holding otherwise, in no way limits or modifies the rule of construction set forth in *Boyce vs. Cage* as I read it.

In the first place, all of the language of that decision is dictum, in so far as it applies to the question of the proper construction to be given to the description of the lands as found in the commissioners' certificate, under which the defendants claimed title to the land in dispute, for the reason

that the court decided the case upon the ground that said certificate was not a final and ultimate proof of the title, but that it contemplated a survey to be subsequently made in accordance with its terms, and that when said survey was made the grantee, Harman, received a patent for the quantity to which he was entitled under said certificate.

The court proceeds to say, however, that had it been proven that *under said survey* said Harman *had been given the whole of the land between the two adjacent proprietors, amounting to more than three hundred and twenty arpents*—the quantity called for in said certificate—*the case might have been different*, and that probably the title of Harman *to the whole* would have been regarded as complete from the date of the act of Congress confirming the report of the commissioners. *It would then have been a grant by definite and specified boundaries.*

It will be noticed that the description of the land which was given in the certificate gave natural landmarks or fixed, permanent objects as the boundaries of the grant *for only three sides*, and that *the fourth side was left open and undetermined by any fixed, specific point or landmark*, but to be shortened or lengthened upon a sliding scale, for the purpose of giving to the grantee a definite quantity of 320 arpents of land. The land was described as situated "on the west margin of the Mississippi river, bounded on the upper side by land of Samuel Phipps and on the lower by land of John Sandal, having a front on the river of about 8 arpents, with a depth of 40, so as to include the aforesaid quantity of 320 superficial arpents," etc. The court said:

"The last expression, viz., '*so as to include the aforesaid quantity of* 320 *superficial arpents*,' would seem to control the previous one setting out the adjacent proprietors and limiting the grant and superficies to 320 arpents situated between those two tracts."

The court did not decide the case, however, upon this ground, as I have just stated; and it is apparent that the

presumption that the parties had their attention fixed upon the specific boundaries or landmarks, as opposed to the question of quantity, cannot be entertained, *for the reason that on one side of this tract there was no specific object or fixed place to attract attention;* but, on the contrary, the granting paper specifically states that the line from the river front between these two ranches on the sides was to run forty arpents, *not to a fixed monument or landmark*, but "so as to include" between said two ranches and the front of the river "said quantity of 320 arpents."

The case of *U. S. vs. Fossat*, 20 Howard, 413, is identical with this case referred by Mr. Justice White. In the Fossat case a Mexican grant in California was under consideration; the quantity was given, and the southern, western, and eastern boundaries were designated by fixed natural landmarks, and the courses, distances, and quantity were also mentioned. This court held that it must be construed as a grant by quantity, with the southern, western, and eastern boundaries as designated in the title papers, and by using a sliding scale in order to fix the quantity named within said boundaries in determining the length of the side lines from south to north.

In the case of *Phelps vs. Wilson*, 16 Louisiana, 185, the court held that the sale of a body of land as a section which has limits mathematically fixed and established and generally known is not a sale *per aversionem* (by specific boundaries). There the sale was of a certain number of acres described according to survey lines which had been mathematically fixed, but which, as a matter of fact, were only imaginary lines upon the earth's surface and did not constitute any fixed or permanent object which it might be presumed the parties fixed upon rather than upon the question of quantity.

In *State vs. Buck and Fruit Co.*, 46 La. An., 670, the court says:

"A sale in which specific boundaries are given is a sale *per aversionem*, or a sale from one fixed boundary to another,

which includes all the ground between the parties mentioned, whether the measure be correctly stated or not, the calls for boundary controlling the enumeration of quantity."

Citing *Harman's Heirs vs. O'Moran*, 18 La., 526; *Prejean vs. Giroir et al.*, 19 La., 422; *Hoover, tutor, vs. Richards*, 1 Robinson, 34; *Saulet vs. Trepagnier*, 2 Robinson, 357; *Labichie vs. Jahan*, 9 Robinson, 30.

It will thus be seen that as late as the year 1894 the supreme court of Louisiana cites the very case which was referred to by Mr. Justice White as holding to the rule of construction for which I am contending.

In the case of *Lodge's Lessee vs. Lee*, 6 Cranch, 237, it was held by this court that the sale of an island by name, with the addition of courses and distances and quantity, was a sale by specific boundaries and carried the entire island. ✻

In the case of *Mitchell vs. Smale*, 140 U. S., 374, this court held that the grant was one by specific boundaries and not by quantity, although the grantee had purchased and paid for only 4.53 acres, whereas the grant within the district of Chicago contained 25 acres additional of dry land outside of the survey, as well as a large area of land under the lake in front of the bank. This additional land existed at the time of the survey and patent.

In that case the grantee received an excess of about six times the quantity paid for by him, and the grant was seven times as large as the quantity it was described as containing. The patent described the land as follows:

"The S. W. fractional quarter of fractional section 20, in township 37, range 15, in the district of lands subject to sale at Chicago, Illinois, containing 4.53 acres according to the official plat and survey of the said lands returned to the General Land Office by the surveyor general."

In this case the sale was made by public auction for a lump sum and not at a rate per acre or sitio, as is shown by the recital in the title paper as to the statement made by

✻ In Sturgeon v Floyd 3 Rich. (S.C.) 80. grant of 1890 acres according to courses and distances was confirmed as a grant by specific boundaries although actually

the public crier in announcing the sale of the land. The words used by him were as follows:

"To that end a proclamation be made to the public at the sound of the drum, as, in effect, the public crier, Florentio Baldizan, made, in a high and clear voice, saying: 'The treasury of the department is going to sell, on account of the national treasury and in accordance with the supreme decree of February 10th, 1842, the agricultural lands and lands for raising cattle and horses which comprise the four leagues of the town site of the depopulated town of Tumacacori and the two sitios of the depopulated stock farm of the same at the points of Huebabi, Potrero, Cerro de San Cayetano, and Calabazas, situated in the district of San Ignacio, the areas, monuments, boundaries, and coterminous tracts of which are stated in the corresponding proceedings of survey executed in the year 1807 by the commissioned surveyor, Don Manuel de Leon,'" etc. (Government's Brief, p. 12.)

Certainly the language used in the patent to De Witt is the exact equivalent of this language, for it describes the land and states that it contains a specific quantity according to a survey which was previously made by the surveyor of this Government, and this Court held that both parties are bound, and that the sale was of the entire tract, and therefore a sale by specific boundaries as contradistinguished from a sale by quantity.

In the case of *Taylor vs. Brown*, 5 Cranch, 251, Mr. Chief Justice Marshall, speaking for this Court, says:

"In conformity with this opinion is that of the judges of Kentucky. Not a case exists, so far as the Court is informed, in which, on a caveat, the quantity of land in the survey of plaintiff or defendant has been considered as affecting the title upon the single principle of surplus. Yet the fact must have often occurred. And in the case of Beckly *vs.* Bryan and Ransdale the contrary principle is expressly laid down. In that cause the Court said:

"'*It is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to divest the owner of a survey of a surplus included within its*

boundaries, namely, where the survey was made posterior to an entry made by another person on the same land, and to do more would be unequal and unjust, inasmuch as a survey which is too small cannot be enlarged.'"

I have endeavored to show that all the grants of land in Sonora were executed contracts of sale in which the purchaser bid a lump sum for the land which had been previously surveyed and specifically located by fixed monuments and natural boundaries, and that in no instance did the government of Mexico expressly reserve in the granting paper itself any excess of land which might appear to be within those boundaries, and in no case could the survey be enlarged if the quantity proved too small.

I have further attempted to show that no such thing as a sale of land by quantity within outboundaries was known to the laws of Sonora during the period covered by these grants, and that in California it was the universal practice for the Government, in making floating grants or grants of quantity within outboundaries, *to expressly reserve the excess lands*, if any existed, *by an express stipulation in the granting paper itself.*

In the case of *Hardin vs. Jordan*, 140 U.S., 374, this Court quotes approvingly from the case of *Middleton vs. Pritchard*, 3 Ill., 510, as follows:

"Where the Government has not reserved any right or interest which might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it."

I have attempted to show that the *law of demasias* which was enacted by Mexico in 1861 was in effect only a wholesale judicial reformation of *all mistakes* which had occurred in making specific surveys of grants for the purpose of sales. Had such mistakes been discovered in grants made by this Government, the only remedy would have been a suit in

equity on the part of the Government, in each individual instance or grant, to reform the grant because of a mistake or mistakes in the survey; and in that event the burden would have been upon the Government to show a palpable mistake by clear, unambiguous, and certain evidence, and proof that the mistake been brought to the attention of this Government as early as the year 1839 would have estopped the Government from securing a reformation of the grant by a suit brought as late as the year 1861, upon the ground of laches alone, as is suggested by Mr. Justice Brewer in the case of *U. S. vs. Hancock*, 133 U. S., 193.

The law of the State of Sonora of May 12, 1835, in express terms recognizes the right of a grantee to all the land within his boundaries, and still more strongly emphasizes the fact that the grants were in no instances floating grants, such as were known to the California laws.

In Mexico the courts had no power to entertain a suit to reform or annul a title to lands. That power was reserved to the political arm of the government. Consequently we find that the political arm of the government attempted to make this wholesale reformation of titles, *on account of mistakes in the surveys*, by the law of demasias, as it is called, in the year 1861. In so doing the Mexican congress recognized the rights of the grantees to the specific boundaries named in their title papers as being paramount to the rights of either the Government or those of any party or parties seeking to secure the excess of lands within said boundaries over the quantity originally supposed to be contained therein at the time of the survey. The Congress of Mexico endeavored to treat the grantees as a court of equity in this country might do if the Government sued for a reformation of the title. Having been in possession of the lands, the grantee was protected in the improvements which he had placed upon them, and was entitled to retain the whole of said lands, and was only required to pay for the surplus

quantity at the rate which was fixed by law as the minimum price for the sale of such lands *at the date of his original purchase.* Could a court of equity have done more than this in granting a reformation of title in a suit on the part of the Government?

He who asks equity must do equity. Are we to be deprived of our lands on account of the mistakes of the Government surveyor, after nearly half a century of possession by *bona fide* purchasers for value, without receiving in return either the money which was originally paid or the quantity of land we were supposed to have received?

But it is now contended by counsel for this Government that said action on the part of the Mexican congress was equivalent to declaring that these grants were grants by quantity and not by specific boundaries.

It seems clear to my mind that this law of the demasias establishes conclusively exactly the contrary proposition, by showing that *the Mexican government has itself treated these grants as being grants by specific boundaries,* but has attempted to make a wholesale reformation of the titles upon the very ground that the grants contained a greater quantity than they were believed to contain at the time of sale, *by reason of mistakes of the surveyors in surveying the land which was sold.*

What else could Mendoza, the superior chief of the treasury, mean in his letter to the secretary of the treasury of the nation in February, 1839, when he said that excesses of lands were being occupied by grantees, "*said excesses arising from the fact that ancient surveyors, from ignorance or bad faith, to measure two sitios measured four and to measure that number measured eight or more sitios, etc.?*" If the grants were grants by quantity within outboundaries, to what mistakes on the part of the surveyors did Mendoza refer? It could make no difference whether the outboundaries within which a limited quantity was being sold were ten miles or a hundred miles apart. Certainly Mendoza could have had no

other meaning than that the grants were grants by specific ~~quantity~~, when he stated that the surveyor from ignorance or bad faith in surveying two sitios surveyed four and in surveying four sitios surveyed eight.

See Report Special Agents Flipper and Tipton, pages 83 and 84.

See testimony of witness Bonillas, at pages 178 *et seq.* of my original brief.

Where a grant purports to have been made on actual survey, the non-existence of that survey, though it may increase the difficulty of ascertaining the land granted, does not change the face of the instrument. (*Blake vs. Doherty*, 5th Wheat., 359.)

This tract was sufficiently identified by the testimony of the witnesses found in titulo of 1807 as to east center, south center, and cienega grande monuments, coupled with the other boundary points fixed by Surveyor Leon, and in such a case it is immaterial if a false or mistaken circumstance be added to the description.

Morrow vs. U. S., 95 U. S., 551.

The Court's attention is respectfully invited to two places in the record in No. 297, which are submitted with confidence as showing conclusively that the grants were of designated and located tracts of land. At page 32, bottom, case No. 297, the inspection of the land contains the statement of the sudelegate that "I consider it (the tract of land) may be of some utility for the raising of cattle and horses by putting upon it a well with its corresponding stone cisterns and drinking water, which well can be constructed at the place called La Canoa, where it is reported that water may be obtained at all times by digging in the dry river bed to a short depth."

It thus appears that this place called La Canoa constituted the main value of the tract of land. This was "the spot

which the interested parties had designated as a center, and which was the very place called San Ygnacio de la Canoa." (Rec., p. 33.)

It seems beyond argument that the land sold was with reference to this place as a center. It was located with this place as a central point. To hold that this point of the land was not in contemplation by the parties does not seen at all possible. They would not have bought the land except that such land embraced this place, which constituted the value of the whole. The sale was of the located tract measured and located from this central point.

On page 74, in case No. 297, it appears that after the San Rafael de la Zanja grant was surveyed it was appraised. Experts "under the oath which they made in due form of law, in accordance with the knowledge which they had of the whole of the tract of land, and in accordance with the laws in relation to the matter, placed the value of sixty dollars on each of the three sitios which contained permanent water, and of thirty dollars upon the remaining one, for the reason that it is susceptible of benefit only by means of a well. With this valuation the commandant offered the said four sitios for sale at public auction for thirty consecutive days soliciting bidders."

Here by the very language of the instrument the sale was of designated land, viz., part containing water and one part susceptible of benefit by means of a well. Part of the land was appraised at one price and part at another. It was thus designated and located. This land was sold (p. 75, Rec. No. 297) for $1,200. To argue that in either the Canoa or San Rafael de la Zanja grant that the parties did not have in mind the specific land containing water would be suggesting that they lacked in common sense.

The same thing is true in the Sonoita grant. The price was fixed (page 121, case No. 27) on the land, because "it has running water and some pieces of land fit for cultivation." The statement was expressly made by the ap-

plicant (page 119) that he did not want the land on the sides of the grant away from the water, "because of the broken up condition of the country and the rocky hills in sight such land would be useless to him." The land which he bid on must have been located in his contemplation and the contemplation of the Mexican officials by the running water and must have been considered to be the land fixed with reference to the central point and the measurements made from it.

What would this grantee have thought if he could have anticipated that in 1898 it would be argued that he bought only an unlocated tract of land which, according to the contention of the United States, may be located as well in the barren hills as along the running water?

Respectfully submitted.

FRANCIS J. HENEY,
Attorney for Appellant.

[redacted]

No. 110

WILLIAM PATON, Jr., TRUSTEE, ET AL., APPELLANTS,

v.

THE UNITED STATES, GEORGE W. ATKINSON, ET AL.

BRIEF ON MOTION TO FILE IMPEACHMENT EVIDENCE.

FRANCIS J. HENRY,
Attorney for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2-20-78

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 119.

WILLIAM FAXON, JR., TRUSTEE, ET AL., APPELLANTS,

vs.

THE UNITED STATES, GEORGE W. ATKINSON, ET AL.

BRIEF ON MOTION TO FILE IMPEACHMENT EVIDENCE.

The official report on the condition of the archives or records of the titles to land grants in Arizona and similar grants in Mexico, which was made by Will M. Tipton and Henry O. Flipper, as the agents of the Department of Justice, was filed as evidence in this case by counsel for the Government since the trial of this cause in the lower court and without the consent, either verbal or written, of this appellant or his attorney. On page 101 of said report the following recital appears, to wit:

"163. Tumacácori, Calabazas y Huevabi (Arizona).

"There is absolutely no record of this grant of any kind in the archives."

The counsel for appellant had no opportunity to object to the filing of said report or to cross-examine said special agents or either of them upon the same or any part thereof, and the admission of said report in evidence, in so far as any of the recitals contained therein tend to affect the question of the validity of this grant, is hereby objected to upon the ground that such recitals are incompetent, for the reason that they have not been made under oath by said Will M. Tipton and said Henry O. Flipper, and for the further reason that this appellant had no opportunity to cross-examine either said Will M. Tipton or said Henry O. Flipper upon the same.

It seems clear to the writer that if the recital above quoted is to be considered by this court the certified copy of the judgment convicting said Henry O. Flipper of having made false official reports and of having supported them by false statements to his commanding officer, and by exhibiting a fraudulent check to his said commanding officer while acting as a quartermaster in the United States Army, is clearly competent, material, pertinent, and relevant and must likewise be admitted in evidence.

The fact that said recital was made jointly by Will M. Tipton and said Henry O. Flipper can in no way affect the competency and materiality of said evidence, which is offered to impeach the credibility of said Henry O. Flipper, and can only affect the weight which is to be given to it by this court. Said report fails to show which of said special agents is responsible for said recital or made the supposed examination of the archives upon which the same is based.

Counsel for the Government attempts to support said recital by new and additional evidence, which is offered by him in his brief upon this motion, and which he is pleased to call Exhibit A and Exhibit B.

These exhibits are two certificates which were made by Victor Aguilar, the Treasurer General of the State of Sonora, in the Republic of Mexico, on March 12, 1894. These cer-

tificates were in the possession of counsel for the Government for more than one year prior to the trial of this case in the Court of Private Land Claims, and were not offered in evidence upon said trial, and are now offered for the first time. This fact alone is sufficient to exclude them; but they contain no statement which conflicts in the slightest degree with the evidence in this case or which tends in any way to justify said recital by said Will M. Tipton and Henry O. Flipper. Counsel for the Government concedes and admits in his brief on this motion that said recital was based upon these two certificates, and that neither said Will M. Tipton nor said Henry O. Flipper ever had free and unrestrained access to all or even to a considerable part of the records relating to land grants in the archives of Sonora, and hence both were unable to make said recital upon actual personal knowledge, and it is therefore clearly the merest hearsay and is incompetent upon that ground alone, and appellant hereby moves to strike it from the record on that ground, if said report is permitted to remain in evidence. (See pages 5 and 6 of brief on the part of the Government in opposition to the motion of appellant to file additional evidence, and see particularly pages 126, 127, and 128 of my brief in this case.)

In contrast to said two certificates I respectfully call the particular attention of this court to a certificate made by said Victor Aguilar, as Treasurer General of said State of Sonora, on the 24th day of April, 1894, only about one month later, and which appears in the record of this case at page 240, and is as follows, to wit:

"Two fifty-cent stamps duly canceled.

"A seal which reads: 'Republica Mexicana, Tesoreria General del Estado de Sonora.'

"Victor Aguilar, General Treasurer of the State of Sonora, Republic of Mexico.

"I certify that the photographs of the documents marked from 1 to 4, concerning the expedientes of Tumacacori, Cal.

abasas, Cocospera, and Arivac, are true copies of the original documents which exist in the archives of this general treasury.

"And at the request of Mr. Colin Cameron I herewith issue these presents, in the city of Hermosillo, on the 24th day of April, 1894.

"(Signed) V. AGUILAR. [RUBRICA.]"

In view of this certificate the language used by Aguilar upon the certificate designated by counsel for the Government as Exhibit A is peculiarly significant, from the fact that it fails to state that there is no record in said archives of the expediente of said grant of 1844, but simply states that there is no record of the sale of said lands; and the language of said Exhibit B is likewise peculiarly significant, from the fact that it also fails to state that there is no record of the expediente of 1807 in said archives, but simply states that said expediente itself is not there. I particularly call the attention of this court to pages 105 and 106 of my brief and to page 137 of said brief. Upon said last page I call attention to the fact that the documents referred to in said certificate by Aguilar, which is found at page 240 of the Record, were not discovered or found by the keeper of the archives until after the Court of Private Land Claims had met for its March term, 1894, and I had secured a continuance of the case, for the reason that the total absence of any record evidence of said grant had just been called to my attention. I now notice that I was in error in stating that this evidence was discovered just before the court met for its March term in 1895, and recall the fact that I sent Mr. Velasco to Hermosillo to make his examination of the archives during the time the Court of Private Land Claims was in session for its March term, 1894, and the discovery was made by Mr. Rochin, the keeper of the archives, upon April 24, 1894, the date mentioned in said certificate.

Counsel for the Government is not accurate in stating that I sought a stipulation to introduce in evidence a supple-

mental report upon said archives by Messrs. Tipton and Flipper, which appears in the record as "Evidence Introduced by Stipulation." The fact is that I wrote Mr. Reynolds to stipulate with me as to the character and general make-up of the two books of Toma de Razon which are found in the archives of Sonora, and in reply Mr. Reynolds sent me a copy of said supplemental report of Messrs. Tipton and Flipper and stated that he would stipulate as to the truth of the facts stated therein, but not as to any other fact mentioned in my letter. After a careful examination of said supplemental report I accepted this offer on the part of Mr. Reynolds and did highly commend the accuracy of said supplemental report. I do the same now, but I emphatically repudiate the idea that I thereby make Mr. Flipper my witness or endorse his credibility as a witness generally. He is a defendant in this case, as well as being an agent for the Government, and naturally I do not hesitate to accept and make use of any admission which may be made by him in our favor; but I fail to see how this in any way binds me to accept all of the statements made by him or Mr. Tipton in their official report, any more than I am bound to accept and adopt as my evidence the testimony given by Mr. Flipper in his direct examination upon the trial of this case, because I urge that his testimony upon cross-examination fully supports the evidence of my own witnesses upon every material point.

"A sense of justice" would seem to have demanded that this supplemental report should have been published with the original report, even if it does count against the Government by reflecting on the integrity of the Toma de Razon books, which are found in the archives of Sonora.

The data contained therein was secured by Messrs. Tipton and Flipper at the same time as the other data contained in said original report, and there would seem to be no good reason for its omission from that report in the first instance in view of the fact that it bears strongly upon a very vital

and material question which is before this court in several of the grant cases, to wit, the question of what is intended by the words "duly recorded" which occur in the sixth article of the Gadsden Treaty. (See my brief, page 108 *et seq.*)

The other points made by Mr. Reynolds in his brief on this motion are entirely personal, and for that reason my respect for this court constrains me to refrain from answering them.

As an example of an utter want of scrupulous care on the part of Mr. Flipper in translating any part of a document where a corrected translation might count against the Government, I respectfully invite the attention of this court to pages 214, 215, and 216 of my brief, where it appears that Mr. Reynolds was led into an egregious blunder by the failure of Mr. Flipper to call his attention to an error in translation which appears in the record, where a correction would have counted strongly against the Government.

In conclusion, I submit that a party who is himself a squatter on a grant and who has been living for twelve years among such squatters, aiding them by his undoubted talents in their efforts to defeat all grants which conflict with their personal interests, whether honest and valid or not, is hardly a proper person to be selected to perform impartial services as a special agent for the Government, whose *ex parte* reports should be received without question and with unqualified credence.

Respectfully submitted.

FRANCIS J. HENEY,
Attorney for Appellant.